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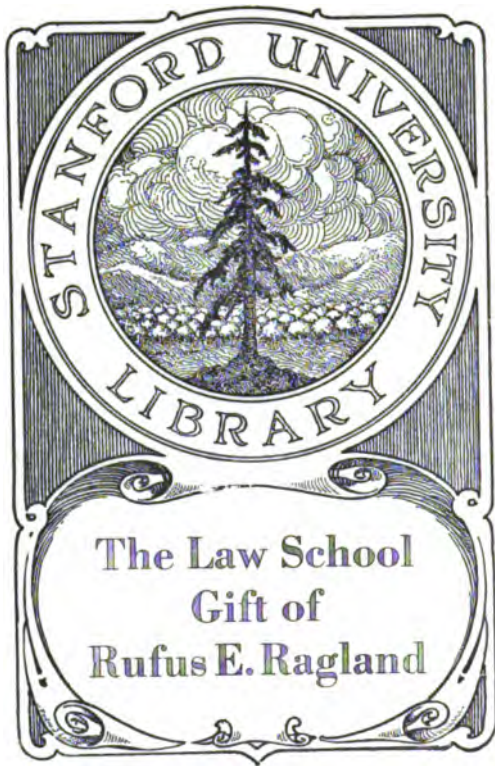
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James P. Fendwell



REPORTS
OF
C A S E S
ARGUED AND DETERMINED
IN THE
HIGH COURT OF CHANCERY,
BEFORE THE
RIGHT HON. SIR JAMES WIGRAM, KNT.
VICE-CHANCELLOR.

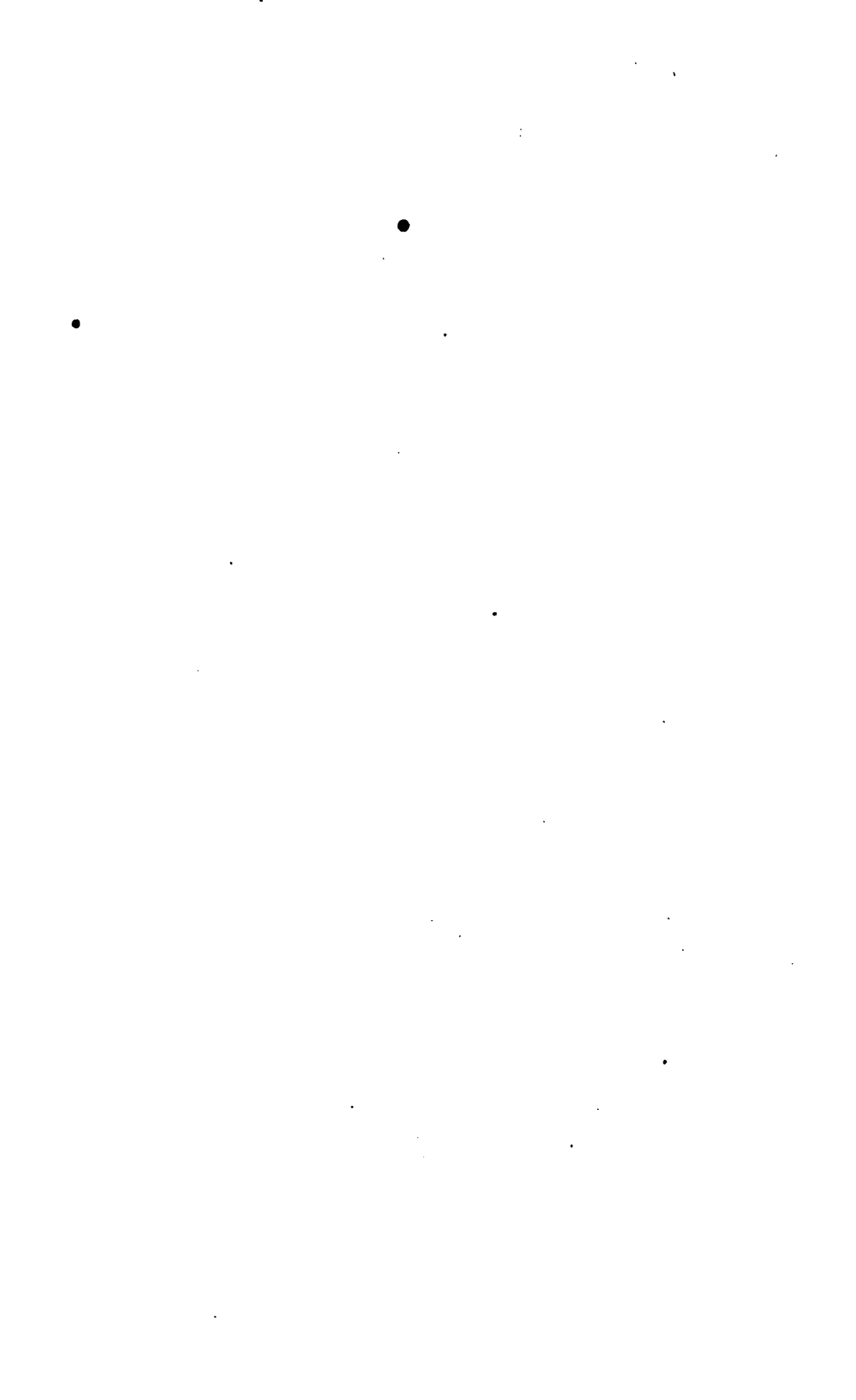
**WITH NOTES AND REFERENCES TO BOTH ENGLISH AND
AMERICAN DECISIONS.**

BY E. FITCH SMITH,
COUNSELLOR AT LAW.

VOL. XXIII.
CONTAINING HARE'S CHANCERY REPORTS, VOL. 1.
1841, 1842—5 & 6 VICTORIÆ.

NEW-YORK:
BANKS, GOULD & CO., LAW BOOKSELLERS.

ALBANY:
GOULD, BAKER AND GOULD 475, BROADWAY.
1851.



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OF
C A S E S
ADJUDGED IN THE
HIGH COURT OF CHANCERY,
BEFORE THE
RIGHT HON. SIR JAMES WIGRAM, KNT.,
VICE-CHANCELLOR.

BY THOMAS HARE,
OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

WITH NOTES AND REFERENCES TO BOTH ENGLISH AND AMERICAN
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LORD LANGDALE, *Master of the Rolls.*

SIR LANCELOT SHADWELL, *Vice-Chancellor of England.*

SIR JAMES L. KNIGHT BRUCE }
SIR JAMES WIGRAM . . . } *Vice-Chancellors.*

SIR FREDERICK J. POLLOCK, *Attorney-General.*

SIR WILLIAM WEBB FOLLETT, *Solicitor-General.*

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REPORTS OF CASES
ADJUDGED IN THE
HIGH COURT OF CHANCERY,
BEFORE

THE RIGHT HON. SIR JAMES WIGRAM, Knt.
VICE CHANCELLOR.

COMMENCING IN MICHAELMAS TERM, 5 VICT. 1841.

HART v. HART.

1841.—5th and 9th November.

Where secondary evidence is admitted to prove the contents of a lost instrument, the Court will presume that the instrument was stamped, unless there be evidence showing that it was not stamped.

To render secondary evidence admissible in proof of the contents of a lost document it is sufficient to prove that every reasonable search for the document has been made although every possible search may not appear to have been made. [1]

Circumstances under which the Court will, before making any other decree in the cause, direct an inquiry with respect to a document which is insisted upon as affecting the interests of the parties in the matter in question, but is not produced.

THE Plaintiff, *Jacob James Hart*, and the Defendant, *Frederick Hart*, having agreed to dissolve the partnership which they had car-

[1] What degree of diligence in the search is necessary, is not easy to define, as each case depends much on its peculiar circumstances, and the question, whether the loss of the instrument is sufficiently proved to admit secondary evidence of its contents, is to be determined by the court and not by the jury, *Page, v. Page* 15 Pick. R. 366. *Utica Ins. Co. v. Caldwell*, 3 Wend. 296. *Taylor v. Riggs*, 1 Pet. 341. *Jackson Ex. dem. Livingston v. Frien*, 16 Johns. R. 591.

The degree of diligence will depend much on the nature of the transaction to which the paper relates, and the apparent value of the paper, and other circumstances. *United States v. Dorbler*, 1 Bald. C. C. R. 519. It seems that in general, the party is

 1841.—Hart v. Hart.

ried on together, the terms of their agreement of dissolution were expressed in an indenture, dated the 1st of March, 1830, whereby, in consideration of an annuity of 1000*l.* to be paid to the Plaintiff by the Defendant for the term of eight years, from the 25th of March then next, if both parties should so long live; and also of the sum of 2000*l.*, as the settled value of the Plaintiff's share in the stock and certain debts, to be paid to him on the 31st of March, 1831; the

Plaintiff relinquished the business to the Defendant thence-
 [*2] forward, and assigned to him absolutely the goods, debts, and effects of the partnership, except some particular debts which were stated in a schedule to the indenture: the Defendant, by the same indenture, covenanted to pay to the Plaintiff three-fifth parts of the amount which should be received in respect of the scheduled debts, after deducting the expenses of recovering them.

The bill was filed in August, 1838, charging that the Defendant

expected to show that he has in good faith, exhausted, in a reasonable degree, all the sources of information and means of discovery, which the nature of the case would naturally suggest, and which were accessible to him. *Rex v. Morton*, 4 M. & S. 48. *Rex v. Castleton*, 6 T. R. 236. *Wills v. Mc. Dole*, 2 South. 501. *Thompson v. Travis*, 8 Scott, 85.

The rigor of the old Common Law rule has been relaxed, and the non-production of an instrumental is now excused for reasons more general and less specific, upon grounds more broad and liberal than were formerly admitted. *Livingston v. Rogers*, 1 Cam. Cas. 27. Same case, 2 John. Cas. 488.

In general, the party should give all the evidence reasonably in his power to prove the loss. *Dumas v. Powell*, 3 Dev. 104. He is not bound however to furnish the strongest possible assurance of the fact. If any suspicion hangs over the instrument, or that it is designedly withheld, a rigid inquiry should be made into the reasons for its non-production. But when there is no suspicion, all that ought to be required is reasonable diligence to obtain the original. *Minor v. Tillotson*, 7 Pet. 99, 101. See also *Underwood v. Lane*, 1 Dev. 175. *Ben v. Pete*, 2 Rand. R. 452. *Braintree v. Battles*, 6 Verm. R. 399.

The rule must be so applied as to promote the ends of Justice, and guard against fraud and imposition. If the circumstances justify a well grounded belief that the original is kept back by design, no secondary evidence ought to be admitted; but when no such suspicion attaches, and the paper is of that description that no doubt can arise as to the proof of its contents, there can be no danger in admitting secondary evidence. *Renn v. Bank of Columbia*, 9 Wheat. 581. 587.

The cases as to the nature and degree of preliminary proof will be found collected 2 Cow. & Hill's notes to Phil. Ev. note 867. p. 1223.

1841.—Hart v. Hart.

had received several sums of money on account of the scheduled debts, which he had not accounted for to the Plaintiff, and praying that an account thereof, and of the expenses of recovering them, might be taken; and that payment of three-fifth parts of the balance to the Plaintiff might be decreed.

The Defendant, by his answer, stated, that the indenture of the 1st of March, 1830, was prepared on the assumption that the debts included in the calculation of the value of the Plaintiff's share were good debts, and that the scheduled debts were bad or doubtful; but that, before the execution of that indenture, it was discovered that four other debts, amounting together to 576*l.* 12*s.* 4*d.*, ought to have been excluded from the calculation of the good debts, and included amongst those which were doubtful; and that a memorandum, also dated the 1st of March, 1830, was made, whereby the Plaintiff, to prevent alteration in the balance sheet, agreed to bear his proportion of three-fifths of any loss which might happen on the four debts therein referred to. The Defendant alleged that this memorandum was signed by the Plaintiff on the 6th of July, 1830, at the same time that the indenture of dissolution was executed: he also alleged that he had tendered to the Plaintiff the balance due to him, on the footing of the agreement as contained in the two instruments.

"The original memorandum was not produced. *S. Mid- [3] ley*, a clerk of the Defendant, deposed that search had been made for it by himself, and by the Defendant and his other clerks, amongst the papers in the Defendant's counting-house; and that they had been unable to find it, though they had looked most carefully in every place where it was likely to be found. *A. T. Forder*, clerk to Mr. *Michael*, the solicitor of both partners at the time of the dissolution, deposed that an exhibit produced in evidence was an examined copy of the memorandum; and Mr. *Michael* deposed to his belief that the same was a true copy; and that the original memorandum was either prepared by him, on the 6th of July, 1830, by the direction of the Plaintiff and Defendant, for the signature of the former, or that it was prepared by the Plaintiff, and approved by the witness on behalf of the Defendant. The same witness deposed that he attested the signature by the Plaintiff to such original memorandum; that

 1841.—Hart v. Hart.

he made an entry of it in his books on that day; and that he had a clear recollection of the contents of the memorandum. The witness also deposed that the original memorandum remained in his possession, as the Defendant's solicitor, until the 5th of January, 1831, when he sent it by *G. Griffiths*, his then clerk, (who had long since left him), to the Defendant at his counting-house, as appeared by a memorandum marked on the copy; and that he had no reason to think it had ever been returned, but he had, nevertheless, diligently searched for it amongst his papers, and was unable to find it.

Mr. Temple and *Mr. Flather*, for the Plaintiff, argued that the deed of dissolution, being under seal, could not be varied by parol; and that the memorandum, if proved, would amount to no [*4] more than a parol agreement. On the tender in evidence on the part of the Defendant of the exhibit, purporting to be an examined copy of the memorandum, they objected to its admission, insisting that, in order to prove the loss of the original, and thereby lay a ground for the introduction of the copy, it was not enough to shew that search had been made at the Defendant's counting-house; but that it should also have been made at every other place where he might have deposited papers; and that *Griffiths* should have been examined, or his absence accounted for; and that, even if the loss of the instrument had been sufficiently shewn, the evidence of its contents could not be received without proof that the original was duly stamped; for, otherwise, a party proving the contents of a lost instrument would be in a better situation than another who actually produced it.

Mr. Sharpe and *Mr. Koe* for the Defendant:

The proof that a lost instrument was duly stamped would commonly be a matter of greater difficulty than the proof of any other fact relating to it; it would, moreover, subjoin the necessity of shewing, by extrinsic testimony, the existence of a fact with regard to a lost instrument, which, in other cases, requires no such evidence, but is

1841.—Hart v. Hart.

proved or negatived by the mere production of the instrument itself. *The King v. Inhabitants of Long Buckby (a): Crisp v. Anderson (b).*

The VICE-CHANCELLOR said, that the evidence, assuming it to be admissible, abundantly proved the making of the memorandum; and it followed that the account could not be taken, without having regard to both instruments, if the evidence were to be received.

*VICE-CHANCELLOR:

[*5]

The Defendant in this case admits the deed, upon the footing of which the Plaintiff seeks to have the account taken; but he alleges that a subsequent agreement was made between himself and the Plaintiff, which was reduced into writing, and that the deed was executed, and a memorandum of the second agreement signed by the Plaintiff on the same day. The Defendant also avers performance on his part of the entire agreement, as contained in the two instruments, and insists that, if the account against him be taken, it should be taken upon the footing of the two instruments. The Plaintiff has not amended his bill in consequence of the case made by the defendant, but has replied generally; and the Defendant alone has gone into evidence in support of the case made by the answer.

The agreement itself is not produced; evidence has been gone into by the Defendant to prove the loss of the agreement. A paper writing, purporting to be an attested copy of the agreement, is tendered in evidence, and parol evidence is also gone into on the part of the Defendant to prove the agreement as contained in the writing produced, and its execution by the Plaintiff. The whole of the Defendant's evidence was read, subject to the opinion of the Court upon certain objections taken by the Plaintiff to its admissibility: these objections I reserved for further consideration.

The objections were two:—First, it was said, that the loss of the

(a) 7 East, 54.

(b) 1 Stark. N. P. 35.

1841.—Hart v. Hart.

agreement was not so proved as to entitle the Defendant to sustain his case by secondary evidence ; and secondly, it was said, that, if the first objection failed, the secondary evidence could not be received without proof being given by the Defendant that the [*6] agreement itself was duly stamped. If the latter of these objections were valid, it would be unnecessary to consider the former, and I will therefore first consider the second objection. At the close of the argument, I expressed myself strongly against this objection, and after an examination of the authorities upon the subject, I find my previous impressions confirmed. Mr. *Starkie*, indeed, says(*a*), that, previous to the admission of secondary evidence to prove the contents of a deed or other instrument which has been lost or destroyed, evidence is necessary to shew that it was properly stamped. He does not, however, refer to any cases which support that proposition. Mr. *Phillipps*, in his book on Evidence(*b*), says, "Where an unstamped copy of an instrument is produced as secondary evidence, it may under various circumstances be presumed that the original was stamped." The special circumstances of the cases of *The King v. The Inhabitants of Long Buckby*(*c*), and *Crisp v. Anderson*(*d*), may explain the apparent caution with which Mr. *Phillipps* has expressed himself. But the late case of *Pooley v. Goodwin*(*e*) leaves no doubt upon my mind as to the correctness of the conclusion I have come to. It is manifest that the greatest injustice might ensue, if, in the case of a lost instrument, the presumption of regularity, upon a merely collateral point, were not raised in favour of the parties claiming under it. The proposition on which I rely is, not that the copy of an unstamped instrument may be given in evidence where the original is lost ; *The King v. The Inhabitants of Castlemorton*(*g*) : *Rippiner v. Wright*(*h*) ; but that the onus of proving the want of a stamp lies upon the party who raises the objection. The principles upon [*7] which courts of law refuse to admit "secondary evidence of

(a) Tr. on Evid. Vol. 2, p. 770, 2nd ed.

(b) Vol. 2, p. 683, 8th ed.

(c) 7 East, 45.

(d) 1 Stark. N. P. 35.

(e) 4 Adol. & Ell. 94.

(g) 3 B. & Ald. 588.

(h) 2 B. & Ald. 478.

 1341.—Hart v. Hart.

the contents of written instruments, have no application to an objection which arises only under the policy of the revenue laws.

The only question, therefore, which remains for consideration is, whether the loss of the agreement has been so proved as to entitle the Defendant to the benefit of the secondary evidence he has adduced. The evidence of the loss, so far as it is necessary to state it in order to explain my views of the case, is shortly to this effect: Mr. *Michael*, who was solicitor to the partnership prior to its dissolution, and who acted for both parties in preparing the deed and the agreement, and Mr. *Forder*, his clerk, proved the execution of the agreement by the Plaintiff on the 6th of July, 1830. Mr. *Michael* further proves that the agreement, when executed by the Plaintiff, was given to him to hold for the Defendant; that it remained in his (Mr. *Michael's*) possession for the Defendant until the month of January, 1831; and that, in that month, Mr. *Michael* sent it by one *Griffiths*, who was then his clerk, to the Defendant at his counting-house; and he deposes, as to his belief that *Griffiths* delivered the agreement to the Defendant accordingly. *Griffiths* is not called as a witness, and Mr. *Michael* offers no reason for not calling *Griffiths*, except by saying that he quitted his service a long time ago. It is satisfactorily proved, that due search has been made for the document at Mr. *Michael's* office, and that it cannot be found there,—a fact which is material only as being corroborative of the fact that *Griffiths*, at all events, removed the document from Mr. *Michael's* office. It is also, I think, satisfactorily proved by Mr. *Midley*, the Defendant's clerk, that due search has been made for the document at the Defendant's counting-house; and it is proved, that, at this counting-house, the transactions to which the agreement refers were all carried on, and that the Plaintiff himself repeatedly attended at that counting-house upon the subject [*8] of those transactions, and examined and took extracts from the books of the Defendant, which contained the entries relating to those transactions. The objections taken to the sufficiency of this evidence, for the purpose of letting in secondary evidence of the contents of the agreement, are two:—First, it is said, that *Griffiths* should have been called by the Defendant to prove the actual

 1841.—Hart v. Hart.

delivery of the agreement to the Defendant, or that some reason should have been given for not calling him ; and secondly, it is said, that the search by the Defendant should not have been confined to his counting-house, but should have been extended to his private residence also. Now the view which I take of the second of these objections renders it expedient that I should abstain from expressing any opinion upon the first in this stage of the cause. I assume, for the purposes of the judgment I think it my duty to pronounce—that *Griffiths* delivered the agreement to the Defendant in January, 1831. But it has occurred to me since the argument as a remarkable fact,—a fact which requires explanation, and which gives great weight to the Defendant's second objection, which I am now considering,—that Mr. *Midley*, the Defendant's clerk, who has been actively concerned in the transactions in question from their commencement in July, 1830, and who gives such important evidence in the cause, evidence of the truth of which I see no ground for entertaining a doubt,—Mr. *Midley* nowhere says he ever saw the agreement at the counting-house, the place at which he and the Defendant are proved by *Midley* himself to have searched for it. If it had been kept there by the Defendant after his receipt of it from *Griffiths*, a fact which I assume, it is scarcely possible that *Midley* should not have known it. Without expecting, therefore, that the Plaintiff will ultimately reap any advantage from the [*9] decree I am about to make, *I think the justice of the case, and the interest of the parties, will be best consulted by my referring it to the Master to inquire what has become of the agreement mentioned in the Defendant's answer to have been signed by the Plaintiff on the 6th July, 1830. The language of this reference gives the Defendant the benefit of the decision of the Court in his favour upon the fact that some agreement is proved to have been so signed ; and to this I think he is entitled.

In order to guard myself against misapprehension as to the grounds upon which I have directed the inquiry, I think it right to add, in conformity with the opinion I expressed on a former day, that I have not considered myself bound in law to direct the inquiry

 1841.—*Lister v. Bradley.*

only because the Defendant had omitted to give evidence upon the points to which the Plaintiff's objections apply. I take my opinion of the law upon that point, from Mr. Baron *Alderson's* judgment in *M'Gahey v. Alston (a)*. It is sufficient to negative reasonable probabilities of any thing being kept back: it is not necessary to negative every possibility. The evidence must be according to the circumstances of the case.

Further directions and costs must be reserved.

**LISTER v. BRADLEY.*

[*10]

1841: November 5, 9.

A legacy to be paid to the legatée "when or if" he attained 21, held to be vested at the death of the testator, and not to be contingent upon the legatee attaining 21.

THIS was the petition of Mr. *Maule*, the administrator, as nominee for and on behalf of her Majesty, of the personal estate of *John Lister*, deceased, one of the Plaintiffs in the cause. The testator, *J. Lister*, of the island of St. Kitt's, notary public, by his will, dated the 30th of November, 1821, bequeathed among others the legacy which was the subject of the petition, in the following words:—"I will and bequeath to my four reputed children which I have had by *Eleanor Plunkett*, 1000*l* currency, each, to be paid them respectively when or if they attain twenty-one years; in the interim, or during their respective lives, the last-mentioned four legacies to be put to interest on separate deeds, which I wish should specify the name of the respective legatee, and to be of undeniable security; also, that the interest thereof be made payable half-yearly to the said *Eleanor Plunkett*, their mother, for their support and education." The testator afterwards gave to the same four legatees, and to their heirs for ever, in four equal parts and shares, certain houses and land, with the appurtenances, adding the follow-

(a) 2 *McC. & W.* 214.

1841.—*Lister v. Bradley.*

ing direction with respect thereto:—"The said messuages and houses and lands to be under the direction and management of the said *Eleanor Plunkett*, for the use and benefit of the said four legatees, or the survivor or survivors of them, until they attain the age of twenty-one years respectively." The testator then gave his household stuff, apparel, and books, to be equally divided, share and share alike, to and among the same four legatees; and concluded by giving all other the residue of his property [*11] and estate, whether real or personal, to "be equally divided, share and share alike, between the same four persons.

The testator died in 1822, leaving the four children, the legatees, infants, surviving. The bill was filed by their next friend, and the accounts of the estate were taken in the cause. *John Lister*, the youngest of the four children, died in 1840, under twenty-one years of age, and intestate. The petition prayed that a sum of 1167*l.* 0*s.* 9*d.* Consols, standing to the credit of the cause, "the residuary account," and also a sum of 902*l.* 11*s.* 2*d.* Consols, standing to the credit of the cause, "the contingent legacy account of the Plaintiffs, the infants *John Lister*, *Eleanor Lister* and *Elizabeth Lister*," and certain small sums of cash, arising from dividends, might be transferred and paid to the Petitioner. The title of the Petitioner to the sum of 1167*l.* 0*s.* 9*d.* Consols, was not disputed. The question upon the petition was, whether the legacy of 1000*l.* currency given by the will to *John Lister*, the late Plaintiff, vested in him at the death of the testator, or was contingent upon his attaining twenty-one years of age. If that legacy was vested, the Petitioner was entitled to it: if contingent, it belonged to the estate of the testator.

Mr. *Wray*, for the Petitioner.

Mr. *Temple*, for the Executors.

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VICE-CHANCELLOR :—

I thought it right to reserve my judgment upon this petition, not from any doubt I entertained at the close of the argument, but because it was stated at the bar that when this case was before the *Vice-Chancellor of England* upon further directions, His Honor had intimated an opinion favourable to the Respondents' case. That the question now before me could not have been judicially under the view of the Court upon further directions, is clear; and the utmost I conceive the Court could have done upon that occasion was, so to express itself, as not to prejudice a question which was not before it, and which might never arise. The statement, however, was sufficient to impose upon me the obligation to consider the case before I expressed my opinion upon it, and carefully to weigh the grounds upon which that opinion should be formed.

The arguments for the Respondents were, in effect—that the word “if” imported a condition, and that the Court was bound to give some effect to so important a word in the will;—that the interest upon the legacy was given, not to the legatee, which, it was said, might have altered the case, but to the mother of the legatee; and, lastly, it was said, that the circumstance that the other bequests to the four reputed children of the testator were given absolutely, furnished a strong ground for inferring that the legacy in question (being expressed in different and conditional language) was intended to be conditional.

I am clearly of opinion that the legacy in question is a vested legacy.

A legacy to A., payable when he attains twenty-one, would clearly be a vested legacy (*a*).

A legacy to A., payable at twenty-one, if or in case he attains

(a) Cases, 1 Roper, Tr. Leg., p. 479, 3rd ed.

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that ago, would, I conceive, be a contingent legacy. *Knight v. Cameron (a)*.

[*13] *A legacy to A., when he attains twenty-one, or if he attains twenty-one, would also be a contingent legacy. *Hanson v. Graham (b)*.

But in each of these cases the strict construction of the words will yield to an intention appearing upon the will, and requiring a different construction.

Bearing these distinctions in mind, I should be sorry to be obliged to decide this case upon any critical effect to be given to the words "when or if" in this will; and I consider myself fortunate in being relieved from the necessity of doing so. For it is abundantly clear, that words, which, abstractedly considered, import a condition, will receive in a court of law a different construction, where the context of the will shews that they ought not to be so construed. Upon the authority of *Hanson v. Graham*, *Branstrom v. Wilkinson (c)*, and other similar cases, I am bound to hold that the gift of the whole interest, for the use and benefit of the legatee, though not to the legatee, would vest the legacy, even if the gift and the direction to pay were not, as in this case they are, separate from each other.

Independently of these considerations, the circumstance that the testator has anxiously directed the four legacies to his reputed children to be immediately severed from his general estate, and put to interest on separate deeds, which are to specify the names of the respective legatees, is sufficient, in my judgment, to fix the construction of the words "when or if" as being used for the convenience only of the legatees themselves, and not for the purpose of making their interests contingent upon their attaining twenty-one years of age. A legacy to be severed from a general estate instantan, for the use and benefit of a legatee, is a

(a) 14 Ves. 389.

(b) 6 Ves. 222.

(c) 7 Ves. 421.

 1841.—Mounsey v. Burnham.

very different thing from a legacy to be severed from the estate only upon the happening of a particular event. This distinction was urged by myself before Lord *Cottenham*, in the case of *Saunders v. Vautier* (a), and was approved by his judgment in that case. The language of Sir *John Leach*, in *Vawdry v. Geddes* (b), is to the same effect.

The circumstance that the houses and lands given to the four legatees, which are clearly vested interests, are, as well as the four legacies, also placed under the mother's direction during the minority of the children, fortifies the conclusion I have come to.

The difference in the form of the gift of the residue, does not alter my opinion. The reason for severing the four legacies from the rest of the children's fortunes, was at once to provide and limit the amount of a fund, which was to be subject to the mother's control for the support and education of the children.

The order, therefore, must be according to the prayer of the petition.

 *MOUNSEY v. BURNHAM.

[*15]

1841.—13th, 15th, 18th, 19th, 22nd November.

The Plaintiff, who was entitled to tithes arising on the Defendant's land, served the Defendant with notice that he had, by a certain indenture of lease, demised those tithes for a term of years. The Plaintiff afterwards filed the bill for an account of the same tithes. The parties agreed to admit in the cause certain facts, in the same manner as if they had been proved by proper and legal evidence; and among others, that a certain exhibit was the notice, and a certain other exhibit was a true copy, of the lease referred to in the notice.

Held,—that the notice was not evidence of the lease so as to relieve the Defendant from the necessity of calling the attesting witness.

That the admission as to the copy of the lease substituted the copy for the original but did not place the copy in a better situation than the original, if it had been produced.

(a) Cr. & Ph. (not yet published).

(b) 1 Russ. & Myl. 208

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It appeared by the exhibit admitted to be a copy of the lease referred to, that the lessee disclaimed all interest in the tithes; and the lessee also put in a disclaimer in the cause.

Held,—that upon these disclaimers the Court might safely make a decree upon the evidence then before it without directing an inquiry with reference to the alleged demise.

THE Plaintiff was inducted, in 1826, into the vicarage and parish *Owthorne*, in the East Riding of *Yorkshire*, and he asserted by his bill a title to tithes in kind of all tithable matters arising in the parish, except corn, with the exception of that arising on a part of the parish which was a new inclosure. The Defendant, *Robert Burnham*, was the owner and occupier of a farm within the parish. The bill was for an account of the tithes of clover and clover-hay had and taken by the Defendant from his said farm, from the 6th of April, 1839, and for payment to the Plaintiff of what should be found due to him in respect of such tithes.

The title of the Plaintiff to the vicarial tithes within the parish was admitted; but the Defendant alleged a title in himself to the rectorial tithes on his lands, by purchase from the impropiator, and insisted that the tithe of clover and clover-hay was a rectorial tithe. The Defendant also alleged, that, by an indenture of the 24th March, 1836, the Plaintiff had granted to his daughter, *Sarah Tatham*, the wife of *Frederick William Coe*, a lease of the tithes arising on the lands of the Defendant for twenty-one years, if the Plaintiff should so long live, and that he had thereby parted with all his interest in such vicarial tithes before the commencement of the suit.

[*16] *It appeared in evidence, that, in April, 1836, the Defendant was served with a notice, dated the 2nd of April, in the following words :—“ Mr. *Robert Burnham*. Take notice, that, by indenture of lease dated the 24th day of March, 1836, I have demised and leased unto *Sarah Tatham Coe*, the wife of *Frederick William Coe*, of &c., all those tithes or tenths arising, growing, and to become due and payable to me, as Vicar of *Owthorne*, from, out of, and upon land held by you in the vicarage of *Owthorne* afore-

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said, for the term of twenty-one years, from the 6th day of April, 1836, if I shall so long live and continue Vicar of *Owthorne* aforesaid. Dated this 2nd day of April, 1836.—*Thomas Mounsey*.” It appeared also, that Mr. and Mrs. *Coe* had been afterwards treated as the proprietors of these vicarial tithes, and that the same had been received by an agent authorized by them.

The indenture of the 24th of March, 1836, was not produced. The only evidence of its existence was contained in the admissions, which, to save the expense of proof, had been entered into on behalf of the Plaintiff and Defendant. The admission, with regard to the lease, was in the following form:—“It is hereby agreed between Mr. &c. [Plaintiff’s solicitor], and Mr. &c. [Defendant’s solicitor], that the Plaintiff shall admit at the hearing of this cause the following facts, in the same manner as if they had been proved by proper and legal evidence; that is to say, ‘that the said Defendant was on the 4th day of April, 1836, served with a notice bearing date the 2nd day of April, 1836, signed by the Plaintiff, *Thomas Mounsey*, and that the paper writing marked (I) is the notice which was so served on the said Defendant: and that the paper writing marked (J) is a true copy of the lease referred to in such notice marked (I).”

*The paper (I) was the notice above stated. The pa- [*17] per (J) purported to be an indenture made the 24th of March, 1836, between the Plaintiff, of the one part, and *Sarah Tatham Coe*, of the other part, witnessing, that, in consideration of natural love and affection, the Plaintiff had demised and there by did demise unto the said *Sarah Tatham Coe*, her executors, administrators, and assigns, for her separate use, all the tithes belonging to the vicarage of *Owthorne* arising from the lands occupied by the Defendant and others, for the term of twenty-one years, if the plaintiff should so long live and continue the vicar, yielding the rent of one pepper-corn yearly during the said term. The indenture appeared to be attested by one *T. T. Mounsey*. The seal was cancelled; and there was this indorsement:—“We, the undersigned, do hereby jointly and severally disavow and disclaim all and any interest, bene-

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foregoing paper writing. Dated this 4th of December, 1839.—*Sarah Tatham Coe: Frederick William Coe.*"

Frederick William Coe, and *Sarah Tatham*, his wife, were made Defendants to the bill by amendment, and filed a disclaimer of all interest in the tithes in question.

Mr. Teed and *Mr. Hallett*, for the Plaintiff:—

After insisting upon the sufficiency of the evidence given in support of the Plaintiff's title to the tithes in question as vicarial tithes, argued—First, that there was no evidence of the lease, inasmuch as the admission, that the paper referred to, was a copy of the lease mentioned in the notice, did not exonerate the Defendant from the necessity of proving, in the ordinary way, an instrument, [*18] upon which he insisted, as defeating the Plaintiff's claim.

Call v. Dunning (a): Bowles and another, Assignees of James, v. Langworthy (b). Secondly, that the copy of the alleged lease, if received as such, must be taken with the disclaimer indorsed upon it, and then it appeared that the lease was avoided; *Thomas v. Cook (c): Whitehead v. Clifford (d): Farmer v. Rogers (e)*: and thirdly,—that, supposing the lease to be a subsisting instrument, yet it was void by the statutes *(g)*, *Monys v. Leake (h): Shaw v. Pritchard (i): Flight v. Salter (k): Metcalfe v. Archbishop of York (l): Aberdeen v. Newland (m)*.

Mr. Sharpe and *Mr. Mylne*, for the Defendant:—

The Plaintiff admits, that he has given the Defendant notice that he had parted with his interest in the tithes by a deed,—he admits also, that the exhibit produced is a true copy of that deed,—the ad-

(a) 4 East, 52.

(b) 5 T. R. 366.

(c) 2 B. & Ald. 119.

(d) 5 Taunt. 518.

(e) 2 Wils. 26.

(g) 13 Eliz. c. 20, repealed by stat. 43 Geo. 3, c. 84, s. 10; revived by stat. 57 Geo. 3, c. 99.

(h) 8 T. R. 411.

(i) 10 B. & C. 241.

(k) 1. B. & Adol. 673. (l) 6 Sim. 224; 1 Myl. & Cr. 547.

(m) 4 Sim. 281.

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fit, property, profit, claim, and demand, under or by virtue of the mission must receive some construction, and it cannot be construed to mean that the exhibit is a copy of a deed which never existed; nor can the Plaintiff now be heard to deny that he made any lease, after formally intimating to the Defendant that he had made it.

The writing indorsed upon the exhibit, and called a disclaimer, is no part of the instrument. It is not referred to in the admission, and cannot be noticed. It can have no greater effect than any writing upon the instrument casually made by a stranger would have; and for any thing which appears, this indorsement might have "been made in that manner. Even if the cancellation of [*19] the deed were proved, it would not, after acceptance of the lease, so destroy its operation as to vest the legal interest again in the Plaintiff. That would require some act having the effect of a surrender or assignment. *Sheppard's Touchstone* (a) : *Doe v. Thomas* (b) : *Magenis v. Macculloch* (c) : *Roe v. Archbishop of York* (d).

There is a distinction between a lease of tithes and a charge upon the benefice. Leases of tithes are frequent, and their legality has never been disputed. The only question then is, whether the lease is void from the inadequacy of the reserved rent; if this were so, a lessee of tithes might always be defeated by shewing that the rent was, in the smallest degree, less than what might have been obtained. The cases do not afford any authority for such an inquiry.

VICE-CHANCELLOR,—

After stating the facts of the case, and the issues raised between the parties, proceeded :—

If the Defendant's objection to the suit, founded upon the lease,

(a) P. 70, par. 2.
(c) Gilb. R. 235.

(b) 9 B. & C. 288.
(d) 6 East, 86.

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be well taken, it will be unnecessary to enter upon the question, whether clover-hay is, in the parish of *Owthorne*, a vicarial tithe, or not. I will, therefore, deal with that objection first.

[*20] Now the alleged lease itself is not produced, and *there is no evidence before me of its existence, except such evidence as the Plaintiff has afforded, by certain admissions, which the Plaintiff and the Defendant *Burnham* have entered into in this cause. The only admission relating to this lease is, an admission that a paper writing produced is a true copy of the lease referred to in a certain notice dated the 2nd of April, 1836, signed by the Plaintiff, with which the Defendant was served by the Plaintiff, or by his order. This notice, which is also an exhibit in the cause, informs the Defendant of the execution by the Plaintiff of the lease of the 24th day of March, 1836.

The lease of the 24th of March, 1836, is attested by one *T. T. Mounsey*; and the Plaintiff insists that the notice of the 2nd of April, 1836, does not discharge the Defendant from his obligation to prove the lease by calling the attesting witness; and that the admission in the cause merely substitutes the admitted copy for the original, but without placing that copy in a better situation than the original could be in if that were produced. I think the former of these objections is well taken, *Phillips on Evidence* (a); and that the latter is well taken also. Consequently, the Plaintiff's rights as vicar, whatever they may be, remain.

This view of the case renders it unnecessary for me to consider the point so elaborately argued at the bar, whether the assumed lease of March, 1836, was void under the statute (b).

The only question then, upon this part of the case, is, whether I should act upon the information, with which the notice of

[*21] the 2nd of April, 1836, furnishes *me, for the purpose of

(a) Vol. 2, p. 649, ed. 8.

(b) 13 Eliz. c. 20.

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directing an inquiry before the Master, or proceed with the cause as if the lease had never had existence. If, upon the evidence before me, I thought the Plaintiff was seeking wrongfully to recover that which really belonged to another, or if I thought the Defendant could be made liable a second time to the payment of the tithes in question, I should not hesitate to exercise my discretion in sending this case for further inquiry; but if I have reason to be satisfied that neither one nor the other of these mischiefs will attend upon a decree in the Plaintiff's favour, supposing him entitled to a decree upon the evidence now before me, there is no reason why I should not apply to this case the strict rules of the Court, and make a decree in favour of that party who, by that evidence, appears entitled to it. Now, in this case, it appears by an indorsement upon the copy of the lease which has been produced, that the lessee, Mrs. *Coe*, who is entitled to the interest created by the lease to her separate use, has disclaimed such interest. She has also disclaimed it in the cause. The question upon these disclaimers, which I now consider material, is, not whether her interest is thereby divested or revested in the Plaintiff; but whether, if the Plaintiff, under the authority of those disclaimers receives the tithes in question in this cause, Mrs. *Coe* can be damaged; and whether she, or any person claiming under her, could successively demand the tithes again. I am of opinion, upon the disclaimer on record, if I am not at liberty to look at the other, that she could not. *Leathes v. Newitt* (a) : *Williams v. Jones* (b). I must, however, be understood to rest my judgment in this part of the case, upon the absence of evidence to support the Defendant's objection, founded upon the lease. The observations I have made upon the disclaimers, are in explanation only of my [*22] reasons for not directing an inquiry as to the lease.

The Vice-Chancellor then stated the nature and effect of the real and documentary evidence adduced on behalf of the Plaintiff, and concluded, by holding that the Plaintiff had established his title to the tithes in question; and he, therefore, made the decree accord-

(a) 3 Ea. & Y. 848.

(b) *Younge*, 252.

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ingly ; observing, that, if the defence had rested upon the effect of the deed of March, 1826, the decree would have been without costs ; but as the case of the Defendant was put upon the question of right, and that ground of defence had failed, the decree must be made with costs.

November 19.

The Court will not, at the hearing of the cause, without a special application, order the Plaintiff to pay the additional costs occasioned by a case made, and allegations inserted in the original bill, which were struck out and abandoned by amendment. The most convenient time for applications in respect of such costs, is immediately upon the cause of complaint arising ; and the amount of the costs complained of is material in reference to the propriety of the application.

THE original bill had prayed an account of vicarial tithes, and, among others, of the tithes of wool and lambs, from April, 1836 ; and it charged the Defendant with having removed such stock at the shearing and lambing seasons to a farm which belonged to him in a neighbouring parish, in order to defraud the Plaintiff of the tithes justly due to him. The Defendant, by his answer, denied such fraudulent intention, and set forth his reasons for such removals as had taken place. Upon amendment of the bill, the whole of the statement, charge, and interrogatories, relating to the tithable matters other than clover and clover-hay, were struck out. About one-half of the contents of the original bill, and a larger proportion of the answer to that bill, related to the matters with regard to which the relief was thus abandoned.

Mr. *Sharpe*, for the Defendant, applied to the Court to [*28] direct, that, on the taxation of the costs of the suit, *regard might be had to those costs which had been incurred in respect of the case originally put forward by the Plaintiff, and afterwards abandoned. He suggested that the costs of the suit in such a case should be apportioned, or that, by analogy to the course di-

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rected by the late order (a), the amount of the costs occasioned by the improper case that had been made should be deducted from the costs to be paid by the Defendant to the Plaintiff.

Mr. Teed, for the Plaintiff:—

The Court has no means, at the hearing, of judging whether the case made by the original bill was properly put forward. All the evidence has been directed to the proof of the case as it stands upon the amended bill. If the Defendant had any ground for asking that he might be paid costs improperly occasioned by the manner in which the suit was conducted, that application ought to be made by motion, and then it might be met by affidavits.

VICE-CHANCELLOR:—

The decree which has been made directs, that the general costs of this suit shall be paid by the Defendant; but it is suggested, on the part of the Defendant, that some special order should be made with reference to certain costs to which he insists that he has been improperly put. The Plaintiff, by his original bill, it is said, alleged a case of fraudulent abstraction of tithes, and that, owing to these allegations, a long answer was necessarily put in by the Defendant. The Plaintiff then amended his bill, and [*24] struck out of it all the allegations of fraud, and reduced his claim to what it now appears. I am asked, not by motion, but at the hearing of the cause, to order that the costs incurred in respect of the portion of the bill and answer which related to the case thus originally made, and afterwards abandoned, should be paid by the Plaintiff. If the Court were to entertain applications of this kind at the hearing, without any special case being made, it would be a practice which could not fail of leading to great inconvenience. I cannot see by what means the Court can, at the hearing, without a spe-

(a) Order xxx. 3rd of April, 1828.

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cial case being made, take upon itself to make the distinction which I am asked to make in this case. A Plaintiff may have been justified in making the allegations in his original bill, although they were afterwards struck out of his amended bill. The allegations may have been denied by the answer, and then struck out of the bill, not because they were untrue, but because the Plaintiff could not prove them. There must be great difficulty in judging of the propriety of the statements and charges of the original bill, at the hearing of the cause; and I have a strong impression that Lord *Cottenham* always refused applications at the hearing for the apportionment of costs on such grounds by the decree. As this is purely a question of practice, I have thought it right to consult the other Judges of the Court before disposing of this case; and I find that the opinions upon the point are certainly not uniform. The rule adopted by the *Vice-Chancellor of England*, which is fully borne out by all the authorities that are to be found, is, to require a special application to be made where questions of this nature, with regard to costs, are raised; and to signify to the parties that the fitting time to make the application is immediately upon the commission of the injury of which [*25] they complain. *This is obviously the rule which convenience would point out. It is not, however, too late at the hearing; but whenever the application is made, it must be a special application. This was the course taken by the parties in *Watts v. Manning* (a), and it is the course which, I think, ought to be pursued.

I shall not make any order at present with respect to the costs in question; but, if the Defendant should think he has a sufficient case, I will order that the decree shall not be drawn up for a few days, that he may have time to give a notice of motion.

I should observe, that, in any such application which shall come before me, the amount of the costs from which the party may seek to be relieved will form a very material consideration in my view of the manner in which I ought to deal with the motion.

1841.—Sutherland v. Briggs.

*SUTHERLAND v. BRIGGS.

[*26]

1841 : November 12, 13, and 18.

The Plaintiff was the lessee of a house and other premises for a term of thirty-one years, at a rent of 60*l.*, and was under a covenant to make certain improvements on the property. He was also tenant from year to year of an adjoining meadow belonging to a different proprietor, at a rent of 9*l.* The lessor of the house became the purchaser of the meadow, and by arrangement between him and the Plaintiff, the improvements were extended, and part of the house was made to project over the field, and part of the field was attached to the demised premises, the Plaintiff paying about half of the expense of the alterations, which far exceeded the sum he had originally covenanted to lay out, and also signing a memorandum, which the lessor drew up, whereby he agreed to pay an entire rent of 80*l.* a-year for the consolidated property.

Held, that the extension of the house into the meadow by the Plaintiff, with the concurrence of his landlord, was evidence of, and was sufficient consideration for, a contract to demise the meadow.

That the act of building part of the house upon the meadow, if it was evidence of any right, was evidence of a right which affected the entire tenement, and that it could not be restricted so as to affect only the part of the meadow actually built upon.

That the extension of the house, part of the demised premises, into the meadow, and the increase and consolidation of the rents, was evidence that the meadow was to be held for the same term as the demised premises.

That the doctrine with regard to the mutuality of contracts, had no application to such a case.

By an indenture of lease, dated the 10th of October, 1831, *James Alexander Frampton* demised to the Plaintiff a house, with some cottages adjoining, situate at *Hayes*, in the county of Middlesex, for the term of thirty-one years, from the 25th of December, 1830, at the yearly rent of 60*l.* By a covenant in the lease, the Plaintiff was to take down two of the cottages, and build a house upon the site, with suitable offices, at an expense of not less than 300*l.*, of which 100*l.* was to be allowed him out of his rent. The house stood upon the verge of the demised premises, and was separated from a meadow, the property of a Mr. *Lock*, only by a ditch, of about six feet wide, which was admitted to be comprised in the lease. *Lock's* meadow had for many years previously been occu-

 1841.—*Sutherland v. Briggs.*

pied with the house by the former tenant thereof, at a yearly rent of 9*l.*; and, upon the lease of the house and premises being made to the Plaintiff, he became a tenant from year to year of the meadow to Mr. *Lock*, at the same rent of 9*l.*

In 1834, it was thought advisable that the house should undergo thorough repair, and that alterations and improve- [*27] ments should also be made in it; but before these repairs or improvements were commenced, Mr. *Frampton* purchased the meadow of *Lock*. A treaty then proceeded between *Frampton* and the Plaintiff with regard to the projected repairs and alterations in the house; and it was proposed to extend the alterations and improvements into *Lock's* meadow. The house was ultimately altered, by carrying the whole of it back to the very edge, if not over the boundary line by which it was separated from the meadow. The principal room was improved by the addition of a bow, the whole of which projected into *Lock's* meadow; the garden-fence was thrown back about eighteen feet; and a belt of trees was planted in the same meadow. The cost of these works, amounting to about 660*l.*, was paid by the Plaintiff and Mr. *Frampton* nearly in moieties. A memorandum was then drawn up in the hand-writing of Mr. *Frampton*, and signed by the Plaintiff, in the following words:—
 “Mr. *Frampton* having advanced me the sum of 350*l.* towards the additions and improvements lately made by me to the house and premises at *Hayes* in my occupation, in addition to 150*l.* previously allowed me for rebuilding the adjoining cottage, it is agreed that the rent of 69*l.*, now paid for the house, &c., and field, shall be increased to 80*l.* a-year, clear of all deductions whatsoever, commencing from Christmas last, dated the 3rd day of February, 1836.—
A. Sutherland.”

Mr. *Frampton* died in September, 1836, having devised his real estates, including *Lock's* meadow, to trustees upon certain trusts for sale. From the time of the agreement of the 3rd of February, 1836, until the 10th of June, 1840, the Plaintiff held the two

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properties as one tenement, and paid an entire rent of 80*l.* to *Frampton* during his life, and, after his death, to his devisees.

‘In a suit which was instituted for the administration of [*28] the estate of *Frampton*, *Lock’s* meadow was ordered to be sold, and was described in the particulars of sale, as in the occupation of the Plaintiff as tenant from year to year, at a rent of 9*l.* The Plaintiff, by his solicitor, attended at the auction, and stated to the effect that the meadow was held by the Plaintiff, under the circumstances, for the residue of the term of thirty-one years, and that it could not be sold otherwise than subject to the right of the Plaintiff. The sale was proceeded with, and the Defendant, who was in the room and heard the statement of the Plaintiff’s solicitor, became the purchaser.

On the 10th of June, 1840, the Plaintiff was served by the devisees of *Frampton* with a notice that *Lock’s* meadow was conveyed to the Defendant, and that he was entitled to the rent of 9*l.* per annum, from the preceding Midsummer. On the 11th of June, 1840, he was served by the Defendant with notice to quit *Lock’s* meadow, which was followed by an action of ejectment.

The bill prayed a declaration by the Court that the Plaintiff was entitled to the tenancy and occupation of *Lock’s* meadow for the residue of the term of the lease of the 10th of October, 1831, and that the proceedings in ejectment might be restrained by injunction. The Defendant, by his answer, denied that the Plaintiff had acquired any title to the meadow, otherwise than as tenant from year to year; and said, that, if any part of the meadow had been built upon, he did not consider such part to have been included in his purchase, and he made no claim thereto. He also alleged that *Frampton* held the house as a trustee, and held the *meadow [*29] only in his own right, and that he had no power to annex the house to the meadow; and a deed was produced in evidence for the purpose of shewing the existence of the trust.

(a) 1 Sim. & Stu. 423.

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Mr. *Temple* and Mr. *Kenyon Parker* for the Plaintiff.

Mr. *Simpkinson* and Mr. *Faber* for the Defendant.

The arguments are stated and severally considered by the Vice-Chancellor in his judgment.

VICE-CHANCELLOR:—

In order to bring the real question in this cause at once to issue, I may observe, that the Defendant cannot be in a better position than *Frampton* would have been if living. The Plaintiff being in the occupation of the meadow in question at the time of the Defendant's purchase, he must be affected with notice of the interest, whatever it may be, which the Plaintiff had in it. *Allen v. Anthony*(a). But independently of this rule of law, it is proved, and indeed admitted, that the Defendant, at the time of his purchase, had notice of the very claim which the Plaintiff makes in this suit. No observation has, in fact, been addressed to the Court on the part of the Defendant, tending to shew that the Defendant stands in a different position from *Frampton*. The whole argument has proceeded upon the supposition that the Defendant must stand or fall by the case made against *Frampton*.

[*30] "I proceed, therefore, to inquire whether, if *Frampton* were living, the Plaintiff could, as against him, have established the right he now claims against the Defendant; and the answer to this question will determine the Defendant's liability.

The equity upon which the Plaintiff rests his case is, the expenditure of money by him upon the house and premises and on *Lock's* meadow, upon the faith of an alleged agreement with *Frampton*.

(a) 1 Mer 282.

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ton, that, in consideration of that expenditure, the Plaintiff should have a lease of the meadow, commensurate with his interest in the house and premises.

The Defendant says, that no such agreement is sufficiently alleged in the bill or proved in the cause. And further, that, if both of these points should be decided against him, there are other grounds upon which he may successfully rest his defence to the bill, and every argument which ingenuity could suggest has been urged in support of the Defendant's case.

The Plaintiff has gone into evidence both oral and documentary. The Defendant has given no evidence, except by calling the attesting witness to a deed, which I shall hereafter notice, who proves his own hand-writing upon the deed as such attesting witness.

Now there are parts of this case which are free from all doubt. It is clear that the specific repairs, alterations, and improvements which were made, both upon the house and premises, and upon *Lock's* meadow, were determined upon by *Frampton* and the Plaintiff together; that the Plaintiff was to be and was the actor in executing these works; that a surveyor, appointed on the part of *Frampton*, superintended the works when in progress; and [*31] that, ultimately, the expense was borne by both parties in nearly equal proportions.

Taking these facts as established, I shall begin by assuming that the agreement upon which the Plaintiff rests his case, is sufficiently alleged in the pleadings, and proved in evidence; and upon this hypothesis, I shall first consider the points which have been urged at the bar on behalf of the Defendant.

The first point, suggested rather than pressed, was, that the Plaintiff being in possession of *Lock's* meadow as tenant from year to year, the expenditure upon the property did not unequivocally shew that it had proceeded upon some antecedent contract with the

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landlord. Undoubtedly, it is, in general, necessary that an act of part performance, which is to take a case out of the Statute of Frauds, should unequivocally demonstrate the existence of some contract to which it must be referred. *Morphet v. Jones* (a). But if the act of extending the house in which the tenant had an interest for a term of years, into the meadow, with the landlord's consent, be not evidence of a contract between them, I know not what act on the part of a tenant in possession of property could possibly be so considered. Circumstances much less stringent have been deemed sufficient. *Sugden, Vend. & Pur.* (b). And if the case of *Munday v. Joliffe* (c), in which Lord Cottenham differed from the *Vice-Chancellor of England*, may be considered as correctly illustrating the rule of this Court, as to the acts of part performance which will take a case out of the statute, the alteration of the garden fence, and making the plantation in the meadow, [*32] would be sufficient. In that case, the expenditure by the tenant was in draining the land, and the Court decreed Mr. Joliffe to grant him a lease, upon the promise of which it was said the expense of draining had been incurred.

It was next said, that the justice of the case would be satisfied by giving to the Plaintiff so much of the meadow as the house stands upon, which the Defendant offered to do. To the suggestion, that justice would be satisfied by doing this, I cannot accede; for some additional portion of the meadow would be essential to the enjoyment of the house. The rules of this Court, however, will not permit me so to consider the case. If the acts done by the Plaintiff are to be considered as acts of part performance, taking the case out of the operation of the statute, the rules of the Court entitle him to prove the entire agreement which the acts relied upon were intended partly to perform. The act of building part of the house upon the meadow, was an act affecting the whole tenement—namely, *Lock's* meadow; and not that part of it only upon which the house stands. The case of *Munday v. Joliffe* will apply also to this part of the present case.

(a) 1 Swans. 172

(c) 4 My. & Cr. (not yet published).

(b) Vol. I. p. 20, 10th ed.

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A third point taken by the Defendant was, that the time for which the Plaintiff was to hold and occupy the meadow was not proved. The memorandum of the 3rd of February, 1836, which is in *Frampton's* hand-writing, does not mention the term during which the Plaintiff is to hold the meadow, for which, in conjunction with the house and premises in the lease, the rent of 80*l.* is to be paid, and no other evidence is given specifically applicable to that point. But I cannot, for that reason, consider that the Plaintiff has not proved enough to support the allegation in his bill, that the time for which he was to hold the meadow was to be commensurate with his lease of the house. His interest in every part of [*33] the meadow must have been intended to be the same. It could not have been intended, that he should hold that part of the meadow upon which the house stood for one term, and the residue of the meadow for another. And about the term for which he was to hold so much of the meadow as the house stood on there can be no doubt. But the reservation of one entire rent of 80*l.* for the entire property, consisting of the house and premises in the lease of October, 1831, and of the meadow, are sufficient to determine the question. The 80*l.* was to be paid for the whole and every part of the consolidated property, and was to endure for the same period as to each part of that property. There is nothing to justify an apportionment of the rent, nor any guide for such apportionment. The whole must continue for the same time.

The next point, and one which was strongly urged upon me, was, that it appeared by the answer and by the deed, as to which the Defendant had examined his only witness, that *Frampton* was not beneficial owner of the house and premises comprised in the lease; but only a trustee for others, and (to use Mr. *Faber's* expression) there was a want of mutuality in the agreement which this bill seeks to enforce. It was insisted, that *Frampton* could not have compelled the Plaintiff to accept a lease of the meadow; and, therefore, *Frampton* could not be compelled to grant such a lease to the Plaintiff. I must observe, in the first place, that it is nowhere suggested, that the Plaintiff had notice of the trust charac-

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ter which it is now said that *Frampton* filled at the time of the agreement. Nor does it appear, even from the deed produced, that *Frampton*, in his character of trustee, could not lawfully have granted the lease of October, 1831. Nor does the deed [*34] appear necessarily to identify "the property comprised in it with the house and premises in question in this cause. The objection in my opinion is not well taken. *Frampton* had clearly power to grant a lease of the meadow, for of that he was owner in fee, and he could not have been heard to say, that he would not grant such lease, only because he could not make a title to the rest of the property. The doctrine of this Court, which is commonly expressed by saying "contracts must be mutual," have no application to a case like this. A vendor cannot make a purchaser take an estate with a bad title ; but the purchaser may compel the vendor to give him the estate with such title as he has. A party who has not signed an agreement relating to lands, may enforce it against one who has signed it, although from want of his own signature he could not himself have been compelled to execute it.

The only remaining point in the defence, except that which I reserved at the outset, was, that the agreement between the parties was reduced into writing, and is contained in the memorandum of the 3rd February, 1836 ; and that, as the duration of the tenancy is not specified therein, the Court cannot introduce it into the agreement between the parties ; for that would be to add a term by parol to a written agreement, which the Court cannot do. From what I have already said, it will have been seen that I am of opinion that the memorandum of the 3rd of February, 1836, taken in connexion with the facts of the case, to which I consider myself clearly at liberty to refer, does itself ascertain the intended duration of the Plaintiff's tenancy of the meadow, although it does not mention it. Independently of this, although the bill is not very conveniently framed for the purpose, I think myself at liberty to read the bill as alleging a substantive agreement by parol, on the part of [*35] *Frampton*, to grant a lease of the "meadow for a term com-

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mensurate with the Plaintiff's interest in the house, at an entire rent of 80*l.* for the whole property. If the pleadings may be so read, there is nothing in law to prevent a plaintiff, (who has proved an act of part performance taking the case out of the statute,) from proving the parol agreement he has alleged, only because some of the terms of that agreement are in writing, and signed by the party charged. He may use the memorandum of the 3rd of February, 1836, in conjunction with the other evidence in the cause, for the purpose of proving the terms of the substantive parol agreement alleged in the bill. But, for the reasons already stated, it is unnecessary to go into that point, the memorandum being, in my opinion, sufficient in itself to ascertain all the terms of the agreement, including the term for which the lease of the meadow was to endure.

The only question which remains for consideration is, that which I have hitherto supposed to have no place in the cause. Has the Plaintiff sufficiently alleged in his bill, and proved in the cause, such an agreement as will entitle him to the decree he asks by his bill? I reserved this point for the last, because it was the point most strongly insisted upon by the Defendant's counsel at the bar, and because I was unable, at the hearing of the cause, to satisfy myself what the agreement was, which the bill alleged. I have since read the bill, and I will now state the two grounds, upon either of which I think the Plaintiff's case sustainable.

The first ground is, that the bill does sufficiently allege an agreement by *Frampton*, before the Plaintiff expended his money, to grant to the Plaintiff a lease of the meadow, commensurate with his interest in the house, as an inducement to, and consideration for, his doing "the repairs, alterations, and improvements, proposed by *Frampton*." [36] The second ground is, that there was a sufficient consideration to support the agreement which was come to between the parties after the expenditure. I do not say that either of these propositions is alleged in the bill with the precision of which the case is capable, and which would have

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relieved the Court from all difficulty upon the subject. But I think the whole tenor of the bill bears out the construction I put upon it.

The bill, after noticing Mr. *Frampton's* proposal to the Plaintiff, as to the repairs, alterations, and improvements referred to, and stating the arrangement made between the Plaintiff and *Frampton*, upon the Plaintiff's suggestion, that the Plaintiff should apply to *Lock* to sell the meadow to *Frampton*, proceeds as follows:—
 "That *J. A. Frampton* expressed his assent to such suggestion, and inquired if Plaintiff thought that the said Mr. *Lock* would be disposed to sell the meadow, as, if so, he *J. A. Frampton* would certainly purchase it and attach it to the other premises; and *J. A. Frampton* ultimately requested Plaintiff to see Mr. *Lock*, and to endeavour to effect an arrangement with him for the purchase of the meadow, and which Plaintiff undertook to do; and it was then arranged between Plaintiff and *J. A. Frampton*, that the aforesaid projected alterations and improvements should not be commenced until the result of the negotiations with Mr. *Lock* should be known, he *J. A. Frampton* observing, that, if he became the purchaser of the meadow, it might be desirable to take in part thereof as a garden, and also to increase the house, by extending a part of the proposed new buildings beyond the boundary line between the two properties, in which case the part so extended would necessarily project into, and be erected on, the meadow, or some part thereof."

[*37] "Now, what sense am I here to put upon the word *attach*. The Plaintiff had the possession of the field at the time as tenant from year to year, and had suggested to *Frampton*, as a reason for purchasing the field, the improved value it would confer upon the house. The promise to attach the meadow to the house, when addressed to the lessee of the house and meadow, who was about to spend money upon the house, can have no rational interpretation but this, that the meadow should be so attached to the house that the two should be enjoyed together.

The bill then alleges, that, on the 18th of October, 1834, *Framp-*

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ton informed the Plaintiff that the purchase of the meadow was completed, and in that letter he treated the meadow as part of the premises to be occupied by the Plaintiff for the residue of the term of his lease. The bill further alleges, that the alterations and improvements in question could not have been made, unless it was contemplated and intended, as the fact was, that the meadow was thenceforth to be united to the house, and to be held and enjoyed therewith by the Plaintiff for the residue of the term of his lease. The bill then, after stating a meeting between the Plaintiff and *Frampton*, at which the then projected alterations and improvements were discussed, proceeds as follows:—"That, in so pointing out the said alterations and improvements to Mr. *Dent*, it was distinctly stated and understood, that the same were to be made with reference to the field being attached to, and forming one occupancy with, the house and premises, and in such comprehensive and substantial a manner as that the same might be permanently beneficial thereto; and, accordingly, it was arranged, among other things, that, besides a part of the house being converted into a dining-room or parlour extending into the field as aforesaid, *the whole of the said back part of the said house, forming [*38] a range of building, comprising the kitchen, wash-house, stable, and coach-house, should be entirely taken down and rebuilt on an enlarged scale, by extending the same along the whole length thereof into the said field."

There are numerous other passages in the bill to the same effect as those I have cited. Those, however, are sufficient to illustrate the grounds I go upon, in holding that this bill sufficiently alleges an agreement between the parties, that the meadow should be annexed to the house, for a term commensurate with the Plaintiff's interest therein, before the Plaintiff agreed to expend his money upon the premises.

Whether this be so or not, I am clearly of opinion that there was a sufficient consideration for the agreement, which is evidenced by the memorandum of the 3rd February, 1836.

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In the course of the argument, the correspondence between the parties, which is in evidence, was much commented upon by the Defendant's counsel. Now, without saying that that correspondence proves the Plaintiff's case, I am safe in saying that it nowhere contradicts it. In fact, I think it strongly supports the Plaintiff's case; for it manifestly treats the meadow and house as one concern, when the subject of the alterations and repairs is under discussion. But it is not in that point of view that I consider that correspondence as important; that importance principally consists in shewing that it was upon *Frampton's* invitation that the Plaintiff expended his money upon the premises.

The Plaintiff is therefore entitled to a decree, according [*39] to the prayer of his bill; but if the Defendant *requires it,

I shall further declare, that a deed shall be executed for carrying into effect the agreement of the parties, and refer it to the Master to settle the same, in case the parties differ. The Defendant must pay the costs of the suit to, and including, the hearing. I make no order now as to subsequent costs, because the conduct of the parties may influence the right to those costs.

Declare that the Plaintiff, his executors, administrators, and assigns, is and are entitled to the tenancy and occupation of the field or piece of meadow land in the pleadings mentioned, until the expiration of the lease, dated the 10th of October, 1831; or the sooner determination thereof, by any act done or committed by the Plaintiff, his executors, administrators, or assigns. And the Defendant is to execute to the Plaintiff, at the Plaintiff's expense, a lease of the said field or piece of meadow land, for the term during which he is hereby declared entitled to the tenancy and occupation thereof. And the Plaintiff is to execute, at his expense, a counterpart of such lease for the Defendant. And by the consent of the Defendant, it is ordered, that the rent to be reserved in respect of the said field or piece of meadow land shall be 9*l.* per annum. And let it be referred to the Master in rotation, to settle the said lease of &c., in case the

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parties differ about the same ; and in settling the said lease, the Master is to have regard to the lease of the 10th of October, 1831. And let the injunction be continued, and let the Master take an account of what is due from the Plaintiff to the Defendant, in respect of the arrears of rent of the said field, &c., after the rate of 9*l.* per annum. And let the Master tax the Plaintiff his costs of this suit up to, and including, the hearing of the same. And let what the Master shall find to be the amount of such arrears of rent, together with the *expenses of the said lease and counter- [*40] part, be deducted from the Plaintiff's costs of this suit, when so taxed ; and [providing for the costs being less than the arrears of rent and expenses of the lease] let the residue of such costs be paid by the Defendant to the Plaintiff. And any of the parties are to be at liberty to apply.

 PHILLIPS v. GODING.

10 and 11 December.

The application, under the 18th Order of 1828, for leave to withdraw replication and amend the bill, is not sufficiently supported by an affidavit of the solicitor of the Plaintiff, that the proposed amendment is material.

Seems, the affidavit in support of the application to withdraw replication and amend, under the 15th Order of 1828, should specify the nature of the proposed amendments.

THE Plaintiff, after he had filed a replication, applied to the Master, for leave, under the 15th Order of 1828, to withdraw the replication, and amend the bill. The application was supported by an affidavit of the Plaintiff's solicitor, who deposed, " that the draft of the intended amendment had been settled, approved, and signed by counsel ; and that such amendments were not intended to be made for the purpose of delay, or vexation ; but because the same were material to the Plaintiff's case." The Master gave leave to amend

Mr. *Haithfield*, for the Defendant, moved to discharge the order

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of the Master, on several grounds: one of which was, that the affidavit did not afford information upon which the Master or the Court could properly be satisfied that the matter of the proposed amendment was material. *Attorney-General v. Fishmongers' Company (a)*.

Mr. Roupell, for the Plaintiff.

There is nothing before the Court from which it can be inferred that the Master has not exercised a proper discretion. The [*41] terms of the order are entirely satisfied. "The order does not specify by whom the affidavit is to be made, and the solicitor is obviously the party most competent to make it. It has never been the practice for the Master, on such applications, to hear the proposed amendments, or have their materiality argued before him.

VICE-CHANCELLOR :—

This was an application to discharge an order of the Master, giving the Plaintiff leave to amend his bill after replication, under the 15th of the Orders of April, 1828.

The 15th Order provides,—“ That, after a replication has been filed, the Plaintiff shall not be permitted to withdraw it, and to amend the bill, without a special order of the Court for that purpose, made upon a motion, of which notice has been given ; the Court being satisfied by affidavit, that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into the bill.”

The jurisdiction of the Court in this respect has been transferred to the Master, without altering the exigency of the order.

The objections taken to the order of the Master were three :—First, insufficient evidence as to the materiality of the amendments ;

(a) 4 Myl. & Cr. 1.

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second, insufficient evidence as to the Plaintiff's diligence ; third, the alleged refusal of the Master to allow the Defendant time to answer the affidavits of the Plaintiff.

With respect to the two first objections, the 15th Order requiring the Court to be satisfied by affidavit that the Plaintiff is entitled to the benefit of the Order, "does not specify by whom [*42] the affidavit required by that Order is to be made. The 13th Order had made provision upon this point. I will not take upon myself to determine that an application under the 15th Order might not be sustained upon the evidence of persons other than those whose evidence the 13th Order makes indispensable. But, if the Plaintiff attempts to support his application under the 15th Order by the evidence of one only of the two persons, both of whose evidence is required by the 13th, I think it impossible for the Court, upon a reasonable construction of the Orders, not to hold such evidence insufficient, unless the witness who speaks to the materiality of the matter of the amendments, gives the Court some better means of judging of such materiality than the mere expression of his own opinion. This is plainly Lord *Cottenham's* opinion, as expressed in *The Attorney-General v. The Fishmongers' Company* ; and I cannot but regret, that, in fairness to the Master, his attention was not called to that case.

I may further observe, by way of caution to the Plaintiff, that it may deserve his consideration, whether, under the 15th Order, it is not necessary that he should specify the nature of the proposed amendments. This would seem to be necessary, according to the report of what fell from Lord *Cottenham* in *The Attorney-General v. The Fishmongers' Company*, and what I understand to be the practice both at the *Rolls* and in the Court of the *Vice-Chancellor of England*. There is a verbal distinction between the 13th and 15th Order, which may justify the Court in requiring the nature of the proposed amendments to be specified in applications under the 15th Order, though this be not required in practice under the 13th Order. The 13th Order requires only that the Court shall be satisfied by

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affidavit that the proposed amendments are "*considered* [*43] *material*." "The 15th Order, which applies to a latter state of the cause, requires that the Court itself shall be satisfied that the proposed amendment "*is material*." I could never be satisfied of this upon the oath only of the Plaintiff's solicitor without knowing the nature of that amendment.

If the Plaintiff should renew his application to amend his bill before the Master, the question of due diligence will again arise. I give no opinion upon the sufficiency of the evidence already before me upon that point. And if the third ground of appeal had any foundation, the Plaintiff will have an opportunity of removing that also.

 JONES v. SMITH.

1841.—November 22, and 23.—Dec. 2.

A party before advancing money on a mortgage, inquired of the mortgagor and his wife, whether any settlement had been made upon their marriage, and was informed that a settlement had been made of the wife's fortune only, and that it did not include the husband's estate which was proposed as the security, and he afterwards advanced the mortgage-money without having seen the settlement or known its contents :—*Held*, that the mortgagee was not, under the circumstances, affected with constructive notice of the contents of the settlement, or of the fact that the settlement comprised the husband's estate.

Negligence may be evidence of, but it is not in law the same thing as, *mala fides*.

The doctrine of constructive notice applies in two cases ; first, where the party charged has notice that the property in dispute is incumbered, or in some way affected, in which case he is deemed to have notice of the facts and instruments, to a knowledge whereof he would have been led by due inquiry after the fact which he actually knew ; and, secondly, where the conduct or of the party charged evinces that he had a suspicion of the truth, and wilfully or fraudulently determined to avoid receiving actual notice of it. [1]

[1] The Lord Chancellor on the affirmance of this case, 1 Phil. 244, lays down the rule, that where a party is informed of the existence of an instrument which may, but does not necessarily affect the property he is about to purchase, or upon which he is to advance money, and it is at the same time stated that the instrument does

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A mortgagor having only a life-interest in the mortgaged premises, and a mortgagee having a charge both of the life-interest and on the interest in remainder, by a joint deed appoint a receiver, who is directed to pay certain debts, expenses, and the charge on the life-interest, and to keep down the interest on the residue. The mortgagee dies, and afterwards the mortgagor. The receiver continues in receipt of the rents and profits after the death of the mortgagor, and pays some part of the rents to the representative of the mortgagee:—

Held, that, upon the construction of the deed, the possession of the receiver was not the possession of the mortgagee; but there was ground for an inquiry whether the representative of the mortgagee by any acts constituted the receiver her agent exclusively.

By an indenture of mortgage, dated the 16th of August, 1810, *Thomas Jones*, being seised in fee of *certain mees- [*44] suages and farms in the county of *Denbigh*, demised the

not affect that property, if he acts fairly and honestly, and believes that statement to be true, but it turns out in the result that he is misled and the instrument does relate to the property, he is not under such circumstances to be fixed with notice. He admits that where a party has notice of a deed, which from the nature of it must affect the property, or is told at the time that it does affect it, he is considered to have notice of the contents of the deed, and of all other deeds to which it refers; but where a party has notice of a deed which does not necessarily, which may, or may not affect the property, and is told that in fact it does not affect it, but relates to some other property: and the party acts fairly in the transaction, and believes the representations to be true, he is not fixed with notice.

See *Green v. Winter*, 4 John. Ch. R. 39. *Hawley v. Cramer*, 4 Cowen R. 717.—*Peters v. Goodrich*, 3 Conn. R. 146. *Flagg v. Mann*, 2 Sumner, 555. *Frazier v. Weston*, 1 Barb. Ch. R. 220.

A purchaser has not, by law, constructive notice of all matters of record, but only such as the title deeds of the estate refer to, or put him upon enquiry for. *Dexter v. Harris*, 2 Mason C. C. R. 631. Justice Story in this case says: "There is no such principle of law, as that what is matter of record shall be constructive notice to a purchaser. The doctrine upon this subject as to purchases is this, that they are affected with constructive notice of all, that is apparent upon the face of the title deeds under which they claim, and of such other facts as these already known necessarily, put them upon enquiry for, and as such enquiry pursued with ordinary diligence and prudence would bring to their knowledge. But of no other facts, extrinsic of the title, and collateral to it, no constructive notice can be presumed, but it must be proved."

The rule in Equity seems to be, that where a tenant, or other person is in possession of an estate, at the time of the purchase, the purchaser is put upon enquiry as to his title; and if he does not enquire, he is bound in the same manner, as if he had enquired, and had positive notice of the title of the party in possession. *Gouverneur v. Lynde*, 2, Paige 300. *Grimstone v. Carter*, 3 Paige, 421. *Spafford v. Manning*,

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same to *Roger Jones* for the term of 500 years, subject to a proviso for cessor of the term, on payment of 800*l.* and interest. After mesne assignments by way of further charge, the premises, by indenture, dated the 23rd of October, 1817, became vested in *Samuel Bennett*, for the residue of the term, to secure the repayment of 2000*l.* and interest. In the year 1819, *Thomas Jones* died, having devised the premises to his son *David Jones*, in fee, subject to the term.

6, Paige, 383. Hagg v. Mann, 2, Sumner, 554. Johnston v. Glancy, 4 Blackf. R. 96. Moreland v. Lemoster, 4 Blackf. R. 386.

Sugden on Vend. and Purchasers, ch. 17, p. 743, 748, 4 Kent's Com. 3d ed. 179.—Daniels v. Davison, 16 Ves. 249. Taylor v. Stibbert, 2 Ves. Jr. 440. Hall v. Smith, 14 Ves. 426. Eyre v. Dolphin, 2 B. & Beatt. 301. Powell v. Dillon, 2 B. & Beatt. 414, 421.

But constructive notice of this sort does not extend beyond the title of the party in possession, and the purchaser is not ordinarily bound to know, or presumed to have notice of the title, under which the party in possession claims or derives his own title. Flagg v. Mann, 2 Sumner, 555. McMeachan v. Griffing, 3 Pick. R. 149. See also Newhall v. Pierce, 5 Pick. R. 450.

Knowledge that another has claims to land is enough to put a party on enquiring and charge him with presumptive notice and this on the ground that where the law imputes to a purchaser knowledge of a fact, of which the exercise of common prudence and ordinary diligence must have apprised him. Hinde, et al. v. Vattier, et al. 1 McLean, 118. Jackson v. Cadwell, 1 Cowen's R. 622.

It is a general rule, that whatever is sufficient to put the party upon inquiry is good notice. Where a party has knowledge of the facts, he has notice of the legal consequences resulting from those facts. Pendleton v. Fay, 2 Paige, 202. The Ploughtry 1 Gallis's C. C. R. 41. Vague reports and rumours from strangers and suspicions of notice, though a strong suspicion, are not sufficient grounds on which to charge a purchaser with notice of a title in a third person. Flagg v. Mann, 2 Sutm. 100.

Where the purchaser employs an attorney to examine the title to the premises which he is about to purchase, notice to the attorney of the equitable claim of a third person to such premises is constructive notice to such purchaser. Griffith v. Griffith, 9 Paige R. 315.

The rule that a purchaser is, in equity chargeable with constructive notice of facts and circumstances which came to the knowledge of his attorney or agent for the purchase or in the examination of the title, and that notice of a deed is constructive notice of the contents thereof, does not apply to the controversies between the vendor and purchaser in relation to their own rights. The rule is only adopted for the protection of the prior Equitable rights of third persons, against subsequent purchasers who claim in hostility to such rights. Champlin v. Laytin, 6 Paige R. 189.

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David Jones, by a settlement, dated the 31st of August, 1820, made upon his marriage with the Defendant *Sarah*, then *Sarah Hartley*, in consideration of the marriage, and of the sum of 1000*l.*, the fortune of his intended wife, conveyed the premises to the use of himself for life, with remainder to the use of *Thomas Hartley*, the brother of *Sarah*, during the life of *David Jones*, to preserve contingent remainders, with remainder to the use and intent that *Sarah* should receive out of the premises an annual sum of 100*l.*, by way of jointure, in bar of dower, with remainder to the first and other sons of the marriage in tail, with remainder to *David Jones* in fee. In the same settlement was contained a power for *David Jones* to charge the property with the sum of 2000*l.*, and covenants by him that the premises were free from incumbrances, for quiet enjoyment, and that he would keep down the interest of such sums of money as should be charged upon the premises by virtue of the power.

The Plaintiff, *John Lloyd Jones*, was the eldest son of the marriage.

In the year 1823, the sum of 2050*l.* being due to *Samuel Bennett* for principal and interest, *David Jones* applied to *Thomas Smith*, an attorney of *Chester*, for an "advance [*45] of money on mortgage of the premises, and to enable him to pay off *Bennett*. In the negotiations which then took place, *Thomas Smith* was not informed of the fact, that the premises were comprised in the settlement of August, 1820. The communication, which was made to him concerning that settlement, so far as it appeared, was shewn by a letter written by *Thomas Smith*, in answer to an application made to him, after he knew of the settlement, for information as to the value of the property, and the amount of incumbrances upon it; and also by the deposition of *Sarah Jones*, who released her annuity under the settlement, to be a competent witness for the plaintiff in the cause.

The evidence of *Sarah Jones* was as follows :—“ The first time I

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became acquainted with *Thomas Smith* was in the summer of 1823. He came to *Acre House* for the purpose of seeing the property of my late husband, before he put a mortgage upon it. I was present on that occasion, and no one else but my child. On that occasion, *Thomas Smith* asked me a question as to the settlement made on my marriage with *David Jones*. The question he asked me was, 'How did you come to bestow your all on so needy a person?' I replied, 'I have not been quite so improvident and simple as that.' He said, 'I understand you had a pretty good fortune.' I told him what I had, and that my friends had taken care of me before my marriage. He said, 'In what way? Had you a settlement?' I replied, 'Yes, I had.' He then asked me where it was, and said, 'I must see it.' I said, 'It was with my brother.' This conversation took place before dinner. No other person excepting my said child was present at it. She is dead. After dinner, *Thomas Smith*, addressing my husband, said, 'I understand this good lady has taken care of herself, and I must see the settlement.'

[*46] My husband replied, that he "was afraid that he (*Thomas Smith*) could not see it without displeasing my aunt, who he said was a rich old lady, and it might be an injury to him (my husband), or words to that effect. *Thomas Smith* asked if he could not see it without her knowing it? More was said upon the subject which I do not exactly recollect; but my husband at length promised, that he would try and get it from my brother for the said *Thomas Smith*. There was no one else, excepting *Thomas Smith*, my husband, and myself, present when this last conversation took place. At that time, to the best of my knowledge, *Thomas Smith* had not advanced my husband any money. When I last saw the settlement, it was in the possession of *Thomas Smith*, who then refused to deliver it to me, saying, that he would keep it with the deeds, where it ought to have been long ago; and that neither Mr. *Jones* nor I had anything to do with the property, as it was entailed. I told him I was very sorry for it,—that I did not know that it was entailed, or that there was any more than my 1000*l.* settled upon it." The statement of the same transaction in the letter of *Thomas Smith*, which was also produced on behalf of the

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Plaintiff, was as follows :—" At the times I made the advances, both *Jones* and his wife solemnly assured me, and indeed offered to make oath, that no settlement was made of his estates on their marriage ; but that a settlement was made upon her of her fortune of 1000*l.* only. I placed confidence in their statement."

The result of these communications was, that *Thomas Smith* advanced to *David Jones* a sum of 2800*l.* ; and in consideration thereof, by an indenture dated the 1st of November, 1823, made between *Samuel Bennett*, of the first part ; *David Jones*, of the second part ; and *Thomas Smith*, of the third part, the premises were assigned unto *Thomas Smith* for the remainder of the term of five hundred years, subject to redemption on [*47] payment of 2800*l.* and interest. Several other sums were subsequently advanced by *Smith* by way of further charge, the last of which was on the 28th of February, 1824, and the whole sum then advanced by *Smith*, on the security of the premises, amounted to 4000*l.*

The letter of *Thomas Smith* which has been referred to, and which was dated in October, 1826, contains a statement of the time at which he became acquainted with the particulars of the settlement of August, 1820. He there says :—" Previous to the last *Ruthin* Assizes they applied to me for a further loan, which I consented to advance upon having a deed in trust to sell, and a fine levied by *Jones* and his wife, and I then required a sight of the settlement : this was at last brought to me ; and, to my great surprise, I found it to be a settlement of his estates previous to his marriage ; in consequence of which I declined advancing the money. *Jones* and his wife solemnly declare that they never gave instructions for the settlement, and that they never knew the contents until it was brought to me, which was a few days before the last *Ruthin* Assizes."

By indenture, dated the 26th of September, 1829, made by *David Jones*, and *Sarah* his wife, of the first part, *Thomas Smith*,

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of the second part, and *Thomas Parry*, of the third part, reciting all the preceding indentures, and reciting, that, at the time of making the said advances, the settlement of August, 1820, was entirely suppressed and kept from the knowledge of *Thomas Smith*, and that *David Jones* had agreed to execute his power under that settlement for better securing of 2000*l.*, part of the 4000*l.*, and *Sarah Jones* had agreed to postpone her annuity to that [*48] charge, *David Jones*, in execution of that power, by *consent of *Thomas Smith*, and with the privity and consent of *Sarah Jones*, demised the premises to *Thomas Parry* for the term of 1000 years, in trust for securing the 2000*l.* to *Thomas Smith*.

By a deed of the 28th of September, 1829, the life interest of *David Jones* in the premises was charged with the further sum of 1200*l.* due to *Thomas Smith* for arrears of interest, and on other accounts.

David Jones at this time also agreed to pay the expenses of, and premiums upon, a policy of insurance upon his life, which was effected for *Thomas Smith's* security; *Jones* was also indebted to *Smith*, *Thomas Parry*, and others, for certain costs and expenses; and he was also indebted to a *Robert Humphrey Jones* upon a bond for 800*l.* Under these circumstances, a deed was executed, bearing date the 19th of December, 1829, and made between *David Jones*, of the first part, *Thomas Smith*, of the second part, *Robert Humphrey Jones*, of the third part, and *Thomas Parry*, of the fourth part, purporting to be made in order to carry into execution an agreement between the parties to it; and, by this deed, *David Jones* and *Thomas Smith* appointed *Parry* their receiver, and declared that he should apply the rents in the following order:—In paying 1st, *Smith's* costs; 2nd, *Parry*, 55*l.* for costs; 3rd, The costs of certain indentures, including the receivership deed; 4th, *Parry's* further costs and expenses; 5th, The costs of *Griffiths & Co.*; 6th, The expense of keeping the policy on foot; 7th, The interest only on *Smith's* two debts of 4000*l.* and 1200*l.*; 8th, The

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principal sum of 1200*l.* due to *Smith*; 9th, The debt due to *Robert Humphrey Jones*. And *Parry* thereby covenanted with the several parties to the deed (including *Robert Humphrey Jones*), whilst the 1200*l.* should continue charged ^{upon} [*49] the premises, and he should continue receiver, to apply his receipts as provided by the deed; and *David Jones*, covenanted with *Thomas Smith* and *Robert Humphrey Jones*, that he would not, without their consent, interrupt the receipt of the rents by *Parry* or his successors, so long as the 1200*l.* and 300*l.*, and the interest thereon, remained unpaid. The deed also provided, that, if *David Jones* should not, upon a vacancy in the receivership, join with *Thomas Smith* in appointing a receiver, *Thomas Smith* alone should have power to do so; and it was thereby agreed that *Thomas Smith* should in no case be responsible for any losses which might occur by the default of *Parry*, or any other receiver; and that *Smith's* remedies for recovering his mortgage debts should not be affected by the deed. No provision was therefore made for payment of the principal sum of 4000*l.*

Thomas Smith died in 1834. The Defendant, *Esther Smith*, was his administratrix. *David Jones* continued *Parry* as receiver, according to the terms of the deed, the sums of 1200*l.* and 300*l.*, and interest, not being then paid off.

David Jones died in February, 1836. *Parry* continued in receipt of the rents and profits of the premises until October, 1837, when *Esther Smith* entered into actual possession and receipt of such rents and profits, as mortgagee of the term. The bill was filed in November, 1838, by *John Lloyd Jones*, and prayed that an account might be taken of what was due to *Esther Smith*, at the time of *David Jones's* death, on the declaration that *Thomas Smith* as having notice of the settlement of August, 1820, should stand as an incumbrancer to the extent of 2000*l.* only; and also that an account might be taken, with annual rests, of the rents and profits received by *Esther Smith*, or *Parry* as her agent, or which [*50] but for their wilful neglect or default might have been received, since the death of *David Jones*, and that, upon payment of

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what might be found due, *Esther Smith* might be decreed to convey the premises to the Plaintiff.

The Defendant, *Esther Smith*, submitted to be redeemed on payment of 4050*l.* 14*s.*, the amount of principal and interest, which he stated to be due to her, on the 29th of September, 1838, in respect of the advances by *Thomas Smith* prior to 1826, after accounting for the monies received by her. She admitted that she had been in possession since October, 1837.

Mr. *Sharpe*, and Mr. *Parry*, for the Plaintiff:—

It is clear, that, before the mortgagee in this case accepted the security, he was informed of the existence of a marriage settlement. If the information thus communicated to him had been introduced into his conveyance by way of recital, the authorities establish the proposition that he would in that case have been affected with notice of the settlement so recited. A distinction between oral and written notice would be arbitrary and insensible, yet that distinction must be taken by this defence. No general rule can be laid down to govern cases of constructive notice. Each case must depend on its own circumstances. When a party insists upon a right to hold a security of this nature, he must shew that he exercised a prudent diligence in acquiring it. If the mortgagee was bound to make any inquiry, he ought not to have confined his inquiries to the every person whose interest it was to give erroneous information; he was bound

to inquire of the trustee, the party interposed by the settlement to protect the interest of its objects. It was no more than a reasonable presumption, from the fact communicated to him, that the settlement would at least in some manner have affected the estate; and even supposing the mortgagor had no interest in concealing the truth, yet it would have been imprudent to rely on his representation of the nature and effect of his marriage settlement. The Court of Chancery, in its administrative functions, always holds it to be necessary, that a settlement shall be produced, wherever such an instrument exists, before permitting funds to be distributed which

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may possibly be the subject of it. *Whitbread v. Jordon* (a) ; *Ferrars v. Cherry* (b) ; *Jackson v. Rowe* (c) ; *Kennedy v. Green* (d) ; *Taylor v. Baker* (e) ; *Coppin v. Fernyhough* (f) ; *Davies v. Thomas* (g) ; *Eyre v. Dolphin* (h) ; *Malpas v. Ackland* (i) ; *Bisco v. Earl of Banbury* (k).

Mr. *Swanston*, and Mr. *Bacon*, for the Defendant *Esther Smith* (l).

VICE-CHANCELLOR :—

Two questions have been raised in this case. The first, and most important, is, whether *Esther Smith* is entitled in equity to the benefit of the term of 500 years for securing so much of the money advanced on mortgage of the premises, as exceeds the amount with which *David Jones* had power, under the settlement, to charge them ? The second question is, *whether *Esther* [*52] *Smith* is to be charged as mortgagee in possession from the death of *David Jones* until she actually entered into possession, in the latter part of the year 1837, or only from the time of such actual entry.

The first of these questions depends upon this—whether *Thomas Smith* is affected with constructive notice of the settlement of August, 1820, before advancing his money ? The second depends upon this—whether *Parry* is to be considered and treated as the agent of *Esther Smith* during the interval to which the second question applies ?

I may here observe, that, if *Thomas Smith* is affected with notice of the settlement, it is with constructive notice only. His advances were unquestionably made upon the security of the term of 500 years ;

(a) 1 Y. & Coll. 303.

(b) 2 Vern. 384.

(c) 2 Sim. & Stu. 472.

(d) 3 Myl. & K. 699.

(e) 5 Price, 306.

(f) 2 B. C. C. 291.

(g) 2 Y. & Coll. 234.

(h) 2 Ba. & Bea. 290.

(i) 3 Russ. 273.

(k) 1 Ca. in Cha. 297.

(l) The substance of the arguments offered on behalf of the Defendant is included in the grounds stated by the *Vice-Chancellor* for his judgment.

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and the case is free from the suspicion which sometimes arises where a security is taken by a creditor for antecedent advances. The question in the cause is, which of two innocent parties is to suffer for the misconduct of a third ; and that question will be found to resolve itself into this, whether a purchaser, who is free even from the suspicion of fraud or contrivance, is to be affected with constructive notice of the settlement only because he did not use extreme caution in his dealings with his vendor.

First, then, is *Thomas Smith* affected with notice of the settlement of August, 1820 ?

The only evidence by which the plaintiff has attempted to affect *Thomas Smith* with notice of the settlement, is *Smith's* letter of October, 1826 (a), and the evidence of the defendant, *Sarah Jones* (b).

[*53] *Now, the observations which arise upon this evidence are short and clear. If the statements in *Smith's* letter, which, it will be observed, is made evidence by the plaintiff, are to be taken as true, there was a positive denial on the part both of *Jones* and his wife, in 1823, that any part of the husband's lands were comprised in any settlement. The effect of *Sarah Jones's* evidence in the cause is not so precise and clear. She is called as a witness, and certainly not a very unwilling witness, (for she has released her jointure of 100*l.* a-year, in order to make herself a competent witness for her son), expressly to prove that *Thomas Smith* had notice that her husband's lands were comprised in the settlement ; but, instead of stating this, the utmost effect of her evidence is, that she told him a settlement had been made upon her marriage, and that her own fortune was secured to her. Any other interpretation of her evidence is inconsistent with the conduct of the parties at the time. The concluding part of *Sarah Jones's* deposition confirms the interpretation I have put upon it and also the truth of the statement, in *Smith's* letter of October, 1826, for (referring to what passed at a subsequent

(a) *Ante*, pp. 46, 47.

(b) *Id.* p. 45.

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meeting with *Smith*,) she says—"I told him I was very sorry for it; that I did not know it was entailed, or that there was any more than my 1000*l.* settled upon it." Either the witness is entitled to no credit, or the testimony is a complete acquittal of *Thomas Smith*, so far as fraud or contrivance might be suspected.

In the argument, it was not contended, that the evidence, in support of the charge of notice, carried the case higher than my interpretation of it; but it was said that the evidence, so interpreted, proved enough for the plaintiff's purpose; that notice to *Thomas Smith* that a settlement was executed upon the marriage of *Jones* and his wife was sufficient to put a prudent man upon inquiry "as to its contents; and that if, instead of insisting upon [*54] the production of the settlement, *Thomas Smith* chose to rely upon the statement of the parties, he must submit to the consequences, if that statement was false. The plaintiff's proposition, which was read from the judgment of Mr. Baron *Alderson* in *Whitbread v. Jordan* (a), was this—"That when a party, having knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries, does not make, but, on the contrary, *studiously avoids making* such obvious inquiries, he must be taken to have notice of those facts which, if he had used such ordinary diligence, he would readily have ascertained;" and, on the part of the plaintiff, it was argued, that the conduct of *Smith* brought him within the scope of the above observation.

I do not in this place stop to point out the manifold distinctions between that case and the present, or the qualifications with which the observations of the learned Judge, in other parts of his judgment, require that the particular passage I have cited should be read. Nor do I here stop to advert to the observations which the decision in that case has called forth from very high authority. I shall do this presently. I refer to the case at this moment only to explain the proposition upon which the Plaintiff has rested his case.

(a) 1 *You. & Coll.* 323.

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The great importance of the principle involved in my decision in this case, has led me to examine the authorities with the utmost attention; and I have now to state the grounds upon which I have come to the conclusion, that the evidence in this case is not sufficient to affect *Thomas Smith* with constructive notice of the settlement under which the Plaintiff claims. In doing this, I am [*55] anxious to avoid, so far as possible, the appearance *of defining what in the abstract is to be deemed constructive notice in equity, lest the place from which I speak should justify others in saying hereafter they have been misled by my exposition of the law.

It is, indeed, scarcely possible to declare a priori what shall be deemed constructive notice, because, unquestionably, that which would not affect one man may be abundantly sufficient to affect another. But I believe I may, with sufficient accuracy for my present purpose, and without danger, assert that the cases in which constructive notice has been established, resolve themselves into two classes:—First, cases in which the party charged has had actual notice that the property in dispute was, in fact, charged, incumbered, or in some way affected, and the Court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, incumbrance, or other circumstance affecting the property of which he had actual notice; and, secondly, cases in which the Court has been satisfied from the evidence before it, that the party charged had designedly abstained from inquiry for the very purpose of avoiding notice. How reluctantly the Court has applied, and within what strict limits it has confined, the latter class of cases, I shall presently consider.

The proposition of law, upon which the former class of cases proceeds, is not that the party charged had notice of a fact or instrument, which, in truth, related to the subject in dispute without his knowing that such was the case, but that he had actual notice that it did so relate. The proposition of law, upon which the second

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class of cases proceeds, is not that the party charged had incautiously neglected to make inquiries, but that he had designedly abstained from such inquiries, for the purpose of avoiding [*56] knowledge,—a purpose which, if proved, would clearly shew that he had a suspicion of the truth, and a fraudulent determination not to learn it. If, in short, there is not actual notice that the property is in some way affected, and no fraudulent turning away from a knowledge of facts which the *res gestæ* would suggest to a prudent mind; if mere want of caution, as distinguished from fraudulent and wilful blindness, is all that can be imputed to the purchaser,—there the doctrine of constructive notice will not apply; there the purchaser will, in equity, be considered, as in fact he is, a bona fide purchaser, without notice. This is clearly Sir *Edward Sugden's* opinion (a); and with that sanction, I have no hesitation in saying it is mine also.

The cases cited at the bar will be found to illustrate one or other of the propositions I have just stated.

The first case to which my attention was directed was that of *Ferrars v. Cherry* (b). The defendant purchased an estate with notice of a post-nuptial settlement, which comprised the estate in dispute; and he was properly held to be affected with constructive notice of the fact, that the post-nuptial settlement was supported by an ante-nuptial agreement. There the defendant had actual notice of a fact relating to, and connected with, the subject-matter of the suit: the post-nuptial settlement might be, as in fact it was, good in law, and the defendant, who was bound to know the law, was properly bound by notice of the settlement itself.

The case of *Whitbread v. Jordan*, which was next cited, I shall notice hereafter, first observing upon the other cases in the order in which they were cited.

(a) *Vend. & Pur.* Vol. 3, pp. 471, 472, ed. 10.

(b) 2 *Vern.* 383.

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[*57] **Jackson v. Rowe (a)* was determined entirely upon a point of pleading. The defendant claimed under a purchaser from one Mrs. *Jackson*, whose title, according to the pleadings, depended upon a settlement in 1789. The *Vice-Chancellor*, in giving judgment, said—"It must be intended, upon these pleadings, that the title of the plaintiff's mother (Mrs. *Jackson*) depended wholly upon this settlement." He then observes, that the purchaser from Mrs. *Jackson* was bound to use diligence in investigating the vendor's title. The Court treated the case as one in which the purchaser had purchased under the settlement of 1789, and, therefore, was bound to take notice of the contents of that settlement, and the settlement clearly affected the lands in question. His Honour immediately adds, what is extremely important to the present case, for it very nearly describes it—"If the plea, instead of resting upon the mere assertion of the intended wife, that she had a good title, had pleaded some instrument anterior to the settlement of 1789, by which the fee-simple had vested in her, and had averred that the Defendant's father relied upon such prior title, and had no notice of the settlement, the defence would have prevailed, because reasonable diligence on the part of the Defendant's father would not necessarily have led to the discovery of the suppressed settlement (b)."

In *Kennedy v. Green (c)*, the attestation upon the deed was of so fraudulent a character, that no man could have shut his eyes to it except by design. This was a case of wilful blindness within the principle of the reported cases, in which that expression is used.

Upon the case of *Taylor v. Baker (d)*, it is unnecessary [*58] to go out of the language of the judgment of the *Lord Chief Baron. A party at the time of making his purchase, and before it was made, had actual notice that one *Strong* had a judgment, or warrant of attorney, which affected the purchased estate. *Strong*, in fact, had a mortgage, and not a judg-

(a) 2 Sim. & Stu. 472.

(b) Id. 475.

(c) 3 Myl. & K. 699.

(d) 5 Price, 306.

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ment; and the Court most correctly held, that the purchaser, having notice that *Strong* had an interest affecting the premises, could not ward off the claim of the incumbrancer, only because the nature of the claim was different from that which the notice conveyed to him.

In *Coppin v. Fernyhough* (a), it was decided only that a purchaser, who has actual notice of one instrument affecting an estate, has constructive notice of all other instruments to which an examination of the first could have led him.

In *Davies v. Thomas* (b), the purchaser had actual notice that the property in question was affected by a marriage settlement, and this settlement, when referred to, gave notice of a will. The Court decided that the purchaser had notice of the will. This falls strictly within the principle of the cases which I have referred to, as constituting the first class of cases of constructive notice. In *Eyre v. Dolphin* (c), the tenant for life under a settlement renewed a lease of the settled property in his own name, and for his own benefit. The Court held, that he was a trustee of the renewed lease for the parties interested under the settlement. The Court also held (a point upon which there could be no doubt), that a purchaser from the tenant for life with actual notice of the above facts could be in no better position than the tenant for life himself. In *Malpas v. Ackland* (d), the lessee accepted a lease of [*59] the premises, and the lease contained a recital, that *Hannam*, one of the parties to the lease, was seised to him and his heirs of the leasehold premises, "upon trust for the use and behoof of *W. Malpas* and *Susannah*, his wife, and *George Colman*, (three other parties to the lease), for such estates in possession, reversion, or remainder, as they became entitled to, after the decease of *Mary Colman*, and that the trust had devolved on *Hannam*." The Court held, that the lessee was affected with no-

(a) 2 Bro. C. C. 291.

(c) 2 Ba. & Be. 290.

(b) 2 You. & Coll. 234.

(d) 3 Russ. 273.

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tice of the trust recited in the lease, whatever that trust might be, a decision of the correctness of which no doubt can exist.

The case of *Bisco v. Earl of Banbury* (a), to which I was referred is strictly within the limits of the rule I am considering. In that case, a party purchased with actual notice of a specific mortgage. The deed creating this mortgage referred to the incumbrances. The question was, whether the purchaser was to be affected with notice of the incumbrances which the deed creating the mortgage disclosed. The language of the *Lord Chancellor* in that case lays down an important and well-established rule; namely, "that the purchaser could not be ignorant of the mortgage, and ought to have seen that, and that would have led him to the other deeds, in which, pursued from one to another, the whole case must have been discovered to him." This is strictly within the principle I have laid down. The purchaser had notice that the property was subject to a specific incumbrance. and an inquiry after that incumbrance would have disclosed the other.

The cases which I have observed upon, are all the cases, except *Whitbread v. Jordan*, which were actually cited. But [*60] other cases, or rather the well-known rules of the Court, established by other cases were referred to in general terms, and to these rules I will now shortly refer.

First, it was said, that if a person purchases an estate which he knows to be in the occupation of another than the vender, he is bound by all the equities which the party in such occupation may have in the land. I do not dispute this proposition,—*Allen v. Anthony*(a), *Daniels v. Davison*, (b) *Taylor v. Stibbert*(c)[1]; for possession is prima facie evidence of a seisin in fee. But this case is strictly within the principle upon which I am proceeding. The purchaser has actual notice of a fact by which the property is affected, and he is bound to ascertain the truth.

Again, it was said that notice of a lease, is notice of the covenants contained in the lease. It is not necessary that I should deny this,

(a) 1 Ca. arg. in Ch. 287. (b) 1 Mer. 282. (c) 17 Ves. 433. (d) 2 Ves. J. 437.

[1] *Knox v. Thompson*, 1 Litt. 350. *Jackson v. Cadwell*, 1 Cowen, R. 622. See *Meux v. Bell*, post 73.

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for it falls strictly within the limits of that constructive notice which I admit to be sufficient.

The last point suggested was this : that a purchaser from an heir at law, with notice of a will by the ancestor under whom the heir claimed, would be affected with notice of the contents of that will, although he was ignorant of such contents, and even misled by the heir at the time of his purchase. To this conclusion, the correctness of which was assumed at the bar, I am far from assenting. I should say, that the question in that case must depend upon circumstances.

If the testator had been long dead, and the heir long in possession, and the other circumstances of the case such as to leave the purchaser in credit for perfect good faith, I think a court of equity would not interfere against the legal title only, because the purchaser had notice of a will, respecting which he was misled. The death of the testator were recent, other consid- [*61] erations might arise affecting the purchaser with the imputation of a fraudulent blindness. But if I were to admit the plaintiff's conclusion to be correct in respect of a will, it would by no means follow that the same reasoning would apply to a marriage settlement. A will imports the disposition by the testator of his property. I am not aware of any legal or equitable presumption, that a man makes a settlement of his landed estate upon his marriage.

To the cases cited at the bar, I will add the following, which clearly fall within the principle of the two classes of cases I noticed at the outset. If a man knows that the legal estate is in a third person at the time he purchases, he is bound to take notice of what the trust is. *Anonymous*, Freeman (a). So, notice that the title deeds are in another man's possession may be held to be notice of any claim which he may have upon the estate. *Hiern v. Mill* (b).

But it may be said, that it is not sufficient that the cases cited at the bar are consistent with the propositions I have laid down. It may be said, that cases ought to be produced which negative a wid-

(a) 2 Freem. 137, pl. 171.

(b) 13 Ves. 114.

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er range of the doctrine of constructive notice, and actually confine the doctrine within the limits I have prescribed. Upon this, I must observe, that the cases which have been decided by the Court, so far as they are brought to my knowledge by the reports, constitute the materials upon which I must determine the limits of the rule ; and if the cases cited for the plaintiff carry the rule no further than it is carried by the propositions laid down, I should be justified in holding that the rule of the Court and those [*62] propositions were co-extensive. I *will, however, now proceed to shew that the reported cases not only justify my conclusion but actually confine the rule of the Court within the limits I have prescribed.

The case of *Daniels v. Davison*, to which I have referred, has always been considered an extreme case (a).

In *Miles v. Langley* (b), a person purchased an estate described as “ late the residence of *Thomas Hellicar*.” *Thomas Hellicar* had therefore held and occupied the land in question under an agreement, and upon the authority of *Daniels v. Davison*, it was argued that the purchaser was bound to have inquired what the interest of *Hellicar* was under his “ late occupation.” But the *Master of the Rolls* held that the obligation to enquire did not arise in the case of vacant possession. His Honor, referring to *Daniels v. Davison*, said, “ that principle has no application here ; *Langley* (the Defendant) being totally ignorant of the fact that the Plaintiff occupied any land comprised in the lease which he purchased.” This decision was confirmed by the *Lord Chancellor* upon the express ground, that a contrary decision would have extended the doctrine laid down in *Daniels v. Davison*. How would it have extended that doctrine ? In this way, and in this way only ; that in *Daniels v. Davison*, the purchaser had, whereas in *Miles v. Langley*, he had not, actual notice of a fact affecting the subject-matter of the purchase. [1]

Again, it has been seen that notice of a lease is notice of the cov-

(a) 2 Russ. & Myl. 629 ; 3 Sug. Vend. p. 470, ed. 10. (b) 1 Russ. & Myl. 39.

[1] See 1 Hall & Twell, 278

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enants contained in that lease. But it has been decided that a purchaser from a derivative lessee is not affected with constructive notice of the contents of the original lease. This point is strongly insisted upon by the *Master of the Rolls in Hanbury v. Litchfield* (a); and the whole of his reasoning points at the distinction between fraud and mere inadvertence. In *Hine v. Dodd* (b), Lord *Hardwicke* distinguishes between notice and suspicion of notice, a distinction clearly borne out by the cases which follow.

In the *Attorney-General v. Backhouse* (c), the question was upon the validity of a lease of charity lands. Lord *Bldon*, speaking of the position of the assignee of the lease, said, "though the purchaser of a lease has never been considered as a purchaser for valuable consideration without notice, to the extent of not being bound to know from whom the lessor derived his title, I am not aware of any case that has gone the length that he is to take notice of all those circumstances under which the lessor derived that title." So, notice of a tenancy will not, it seems, affect a purchaser with constructive notice of the lessor's title (d); nor will a purchaser, *bonâ fide* and without notice, be affected by the mere circumstance of the vendor having been out of possession for many years. *Orwith v. Plummer* (e).

The mere absence of title-deeds has never been held sufficient per se to affect a purchaser with notice of the interest of the person who had the deeds. *Plumb v. Fluit*; (f) *Evans v. Bicknell* (g).

The next case I shall refer to appears to conclude the question I am considering. In *Cothay v. Sydenham* (h), a purchaser had notice that a draft of a deed was prepared, but not that a deed was executed; and it was held that he was not bound [*64] by notice of the deed, although, in fact, it was executed.

(a) 2 Myl. & K. 683.

(b) 2 Atk. 275.

(c) 17 Ves. 293.

(d) 3 Sug. Vend. p. 473, ed. 10.

(e) Bac. Abr. tit. Mortgage (E),

(f) 2 Anstr. 432.

(g) 6 Ves. 174.

s. 3; 2 Vern. 636, S. C.

(h) 2 Bro. C. C. 391.

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"If," said Lord *Thurlow*, "the notice had been of a deed actually executed, it certainly would do, but where the notice is not of a deed, but only of an intention to execute a deed, it is otherwise; there is no case or reasoning which goes so far as to say that the purchaser shall be affected by notice of a deed in contemplation."

Sir *Edward Sugden*, who, from his learning and great experience, particularly in the conveyancing department of the law, I cannot but consider a high authority upon this subject, has the following passage in the last edition of his work on *Vendors and Purchasers* (a):—"The recital in a deed of a fact which may or may not, according to circumstances, be held in a court of equity to amount to a fraud, will not, it seems, affect a purchaser for valuable consideration, denying actual notice of the fraud(b)." Nor will circumstances amounting to a mere suspicion of fraud be deemed notice thereof to a purchaser. Upon the same authority (c), I conceive that notice of a term assigned to attend the inheritance, is not notice to a purchaser of the incumbrances which affect the inheritance, "for it is notice of nothing but that there is an inheritance to be protected, and that the term is attendant."

The only remaining case which I propose to consider is that of *Whitbread v. Jordan* (d). I have reserved this case for the last, because it was the case most strongly relied upon by the Plaintiff. In that case, the Plaintiffs were brewers, and *Jordan* was a publican whom they supplied with beer. *Boulnois* was a wine and [*65] spirit merchant. It is a practice almost amounting to a local custom, for brewers in the Metropolis to lend money to publicans whom they supply with beer, upon the security of an equitable deposit of their deeds. *Jordan*, prior to his dealings with *Boulnois*, had deposited certain deeds relating to his property with Messrs. *Whitbread* for securing a large sum of money. *Jordan* afterwards executed to *Boulnois* a legal mortgage of the property affected by the deposit with the Plaintiff, as a security for an antecedent debt. *Boul-*

(a) P. 576, ed. 10.

(b) 3 Ridg. P. C. 512; 17 Ves. 293.

(c) Sug. V. & P. 477.

(d) 1 You. & Col. 303.

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nois, at the time of accepting this security, had notice of *Jordan's* debt to the Plaintiff, and of the ordinary practice existing between brewers and publicans. *Boulnois* made no inquiry of the brewers. Upon this state of circumstances, Mr. Baron *Alderson* decided that *Boulnois* was affected with constructive notice of the Plaintiff's deposit. Now the question upon this case is, whether it falls within the limits of those principles by which I think the doctrine of constructive notice is bounded. I have always considered that the case might, without violence, be brought within the principle of the first proposition I have laid down. For the evidence in support of the prevailing practice between brewers and publicans was so strong, that, as against a wine and spirit merchant in the Metropolis, who was aware of that practice, it could scarcely have been unjust to hold that a deposit of deeds was an inseparable incident to a large money credit existing between a brewer and a publican. And, if that reasoning were admissible, the notice which *Boulnois* had of *Jordan's* debt to the Plaintiff, would be actual notice of a fact affecting his property. This, however, was not the ground upon which the learned Baron rested his judgment. Nor did he rest it upon the vague and untenable ground, that mere want of caution, untainted by wilful blindness, to be accounted for only by a fraudulent purpose in *Boulnois*, was sufficient to support his decree. He rests his judgment pointedly and expressly upon *Boulnois* having [*66] "studiously avoided" making the obvious inquiries which the facts of the case must have suggested "to any honest man using ordinary caution." Even with this explanation, Sir *Edward Sugden* has considered the case as a dangerous extension of the law as to constructive notice. "The rule of equity," (he observes (a)), "not to relieve against a purchaser having the legal estate, is not confined to a prudent or wary purchaser, but to a bona fide one without notice. It could hardly be maintained, that a deposit of deeds is of itself implied notice to a subsequent purchaser or mortgagee who acting bona fide, but not cautiously; does not inquire after the deeds. In such a case, both parties have acted without prudence; one has taken a de-

(a) *Vend. & Pur.*, Vol. 2, p. 421, ed. 10.

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posit of the deeds without a conveyance, the other has obtained a conveyance without the deeds ; and each, in the absence of fraud, is at liberty to make the best use he can of his imperfect title. These observations do not apply to a case where no enquiry is made, *in order that* the fact of the deposit might not be disclosed."

Arguments, however, were addressed to me during the discussion of this case, which deserve particular notice. First, I was pressed with the argument, that, in the practical application of the rule which obliges a purchaser to pursue incumbrances from deed to deed, cases must occur in which one incumbrance, and one only, would be referred to as being contained in a particular deed ; and it was said, and I think correctly, that a purchaser who relied upon such a reference, would be subject to all other incumbrances to which an examination of the deed referred to would have led him. This, it was argued, was analogous to the case before the Court for that ['67] the reference to a deed as containing one specified incumbrance, was equivalent to a statement that it contained no others ; and that if such a statement in a deed would not excuse a party from inquiry, neither could a similar statement made by word of mouth. If I were to admit, which I do not, that the cases are analogous, I should still deny the correctness of the Plaintiff's conclusion from the premises he has assumed. In the application of fixed rules of law, extreme cases will sometimes occur, in which those rules will draw to themselves cases not within the scope of their original design ; and if the case suggested in argument were really analogous to that before the Court, I should not feel myself bound to govern it by the principle insisted upon, only because another case, supposed to be analogous to this, might, under some supposed state of circumstances, have become affected by that principle. But the cases in my opinion are not analogous. In the case suggested at the bar, the purchaser would have had notice of a given incumbrance that A. B. had an interest in the estate. The rule of the Court obliges him, at his peril, to ascertain what A. B.'s interest is. Unless it can be argued that A. B.'s interest would be unconnected with and independent of prior or co-ordinate incumbrances, the in-

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quiry as to A. B.'s interest can only be satisfied by learning the others also ; and the case suggested is, therefore, within the spirit as well as the letter of the rule.

Another argument for the Plaintiff, which I think it right to notice was founded upon the salutary practice introduced by the present *Master of the Rolls*, of requiring every settlement made upon marriage to be produced, when it appears there has been such a settlement ; although it may be sworn that the property of the woman sought to be obtained out of Court is not comprised in such settlement. The only inference I can draw from this [*68] practice is, that the Court itself uses extreme caution, and not that a purchaser is dishonest only because he is less cautious than the Court. The circumstance, however, that the Court did not, until the present *Master of the Rolls* introduced the practice, (a practice which, I believe, is not fully established, except in his Court) consider this extreme caution necessary, is strong to shew that a less strict practice out of Court cannot *per se* be evidence of culpable neglect.

Upon the whole, I remain of the opinion I entertained during the argument, that this case cannot be brought within the scope of the authorities which at once establish and limit the cases to which the doctrine of constructive notice is applied.

For, first, it is incontrovertibly clear that *Smith* had not actual notice of the mortgaged property being in any way affected with the Plaintiff's interest. The contrary of this has not been suggested, and the point, therefore, requires no observation. Therefore, secondly, if *Smith's* estate is to be affected by the Plaintiff's claim, it must be upon the ground of his having purposely avoided inquiry in order to avoid discovery. But is such a supposition consistent with a single fact in this case ? His debt was not, like that of *Boulnois* in *Whitbread v. Jordan*, an antecedent debt, for which he might be glad to get any security. The advance of his money was contemporaneous with the mortgage which secures it. His mortgagor was a needy

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man, and the evidence of *Sarah Jones* proves that *Smith*, at the time of treating for the first mortgage, so considered him. The letter of October, 1826, which the Plaintiff has put in evidence, suggests the fraud which was practised upon *Smith*; and the evidence [*69] of *Sarah Jones* proves the suggestions in that letter *to be true. Where is the ground for questioning the honesty and bona fides of *Smith*, even if his caution could be successfully impeached? How can any thing, exceeding want of caution, be imputed to the man who parts with his money upon the bare faith of a security without any assignable motive? The only knowledge *Smith* had was, that there was a settlement. But the contemporaneous assertion respecting that settlement was, that it related to other property than the husband's. A simple denial by *Jones* and wife, that there was any settlement affecting *Jones's* property, would clearly have made *Smith* safe. How can it be argued that such denial is qualified by the statement that there is a settlement relating to other property? Nay more,—is not the apparent candour of that statement calculated rather to inspire confidence, than to excite suspicion and lay a foundation for inquiry? If *Smith* was bound to inquire after one deed of which he was told nothing, except that it did not relate to *Jones's* estate, why, upon the same principle, should he not be bound to examine any other deed, of the mere existence of which he had notice? If notice of the existence of a settlement, declared not to affect the husband's estate, is to put a purchaser upon inquiry, only because it may by possibility affect it, how can the plaintiff stop short of the conclusion, that marriage alone should be constructive notice of any settlement that may have been executed? And why, upon the same principle, should not every man who deals with his neighbour, without knowing he is married, be affected with notice of his marriage, and thence with notice of his marriage settlement (if any), and thence with notice of the contents of the settlement? The basis of the plaintiff's argument is this, that a purchaser is imperatively bound to inquire, wherever he has notice of a fact, which, by bare possibility, may affect the subject of his purchase.

[*70] *The affairs of mankind cannot be carried on with ordinary security, if a doctrine like that of constructive notice

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is to be refined upon until it is extended to cases like the present. I should myself incline to limit the cases to which the doctrine is applied, rather than to extend them, were it not that the principle upon which these cases are decided is sound in itself; and that it is better to carry out a sound principle to its just limits, even at the occasional expense of individual hardship, than render the law uncertain and fluctuating, by arbitrarily refusing to apply an acknowledged principle to cases within its range.

It was further urged, that *Smith* was a solicitor, and that his conduct should, therefore, be viewed with greater jealousy. Undoubtedly, if I found a Solicitor taking a security for an antecedent debt or otherwise, under suspicious circumstances, I should be disposed to consider his professional character an important circumstance by which to bring the fairness of his conduct to a test. But I cannot consider a solicitor as one of a class who would wantonly place his own property in jeopardy.

It was also said, that the settlor and his wife had done all that could be done to secure the estate to the Plaintiff, then unborn; and that, if the transactions upon which *Smith's* title depends were to be allowed to prevail, no security would exist in marriage settlements. But the answer to this is, that the fault is in the law, which leaves it in the power of a settlor so to defraud others. The basis of the whole fraud was the concealment by *Jones*, at and after the time of his marriage, of the existence of the old term of 500 years. The law which permits the existence of such interests, has enabled *Jones* to defraud either *Smith* or the Plaintiff; and if *Smith* acted bona fide, equity, upon its acknowledged principles, is bound to leave the legal right where it finds [*71] it. *Walvin v. Lee* (a).

I may observe, that the distinction between negligence and mala fides is now firmly established at law. "Gross negligence," (says Lord Denman in *Goodman v. Harvey* (b)), "may be evidence of

(a) 3 Ves. 31.

(b) 4 Adol. & Ell. 376. And see *Uthv. Rich*, 10 Adol. & Ell. 791.

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mala fides, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine." The doctrines of law and equity upon this point ought to be concurrent.

My conclusion, upon this part of the case is, that *Smith* is a mortgagee without notice, and that a decree must pass in his favour upon that principle.

I have had the less hesitation in deciding this cause in the Defendant's favour, because, my judgment proceeding upon the established bona fides of *Smith's* conduct, the case can be no authority for purchasers of whose conduct the same thing cannot be predicated.

I now proceed to consider the second point in the case, namely, from what time *Esther Smith* is to be considered in possession of the property.

The fact which raises this question is, that, from the death of *David Jones*, and after his interest in the estate had determined, until *Esther Smith* entered into the actual receipt of the rents and profits, *Parry*, the receiver, appointed by the deed of December, 1829, continued to receive the rents, and paid them, or part of them, over to *Esther Smith*. Upon the effect of the deed of December, 1829, I am required to consider and treat *Esther* [*72] *Smith* as mortgagee in possession of the premises by *Parry*, her agent. The effect of this will be to make *Esther Smith* liable for *Parry's* defaults. Upon the construction of the deed alone I cannot do this. *Parry* was the agent of *David Jones* and *Thomas Smith* during their joint lives. He was the receiver of *David Jones* after *Thomas Smith's* death; and I think it manifest, that the intention of the parties to the deed was, to give *Thomas Smith* and *Richard Humphreys Jones* the benefit of having the rents applied for their benefit during the continuance of *David Jones's* life, and at the same time to exclude *Thomas Smith* from incurring the responsibilities of a mortgagee in possession of the property. But if *Esther Smith* has in fact received some rents of the estate by the

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hands of *Parry* since *David Jones'* death, and if the Plaintiff thinks he can establish the fact, that *Esther Smith* has so acted with *Parry* since *David Jones'* death, as to constitute *Parry* her exclusive agent, I will refer that for inquiry to the Master, with liberty to state special circumstances.

The usual decree for redemption must be made, treating *Esther Smith* as mortgagee for the 4000*l.*

The costs of the suit, so far as it is a suit to redeem, must follow the usual decree in a suit for that purpose. But so far as the costs of the suit have been occasioned by the litigation respecting the interest of the Defendant *Smith* in the 500 years' term, I shall follow the precedent afforded me by the case of *Hanbury v. Litchfield* (a) and give no costs.

Liberty to apply must be reserved by the decree.

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It is not necessary to give notice of an equitable incumbrance to more than one of several trustees of the property, so long as the circumstances of the case remain unaltered, by the death of that trustee, or his ceasing to continue such trustee, or otherwise [1].

On the question of notice, where there is actual knowledge, the Court will not distinguish between knowledge acquired in one character, and that obtained in another.

Notice of an equitable assignment, to the trustee or one of several trustees of the property, is necessary in order to perfect the assignment, and to acquire and maintain priority.

Inquiry by a puisne incumbrancer is immaterial, where none of the trustees of the property at the time knew of the prior incumbrance, and where the result of the inquiry would not, therefore, have affected the conduct of the puisne incumbrancer.

Circumstances under which no costs will be ordered to be paid, as between Co-Defendants, in an interpleading suit.

(a) 2 Myl. & K. 629—633.

[1] See *Pinkett v. Shight*, 2 Hare, 136. 7. *Duncan v. Chamberlain* 11 Sim. 123.

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Construction of the 48th Order of the 26th of August, 1841, on the framing of the Master's reports.

By a bond, dated the 5th of July, 1824, *Henry Meux*, *Thomas Starling Benson*, *Richard Latham*, *Richard Barnett*, and *William Prior*, were jointly and severally bound to *Mary Benson Jefferies* in the penal sum of 16,000*l.*, conditioned for the payment of the principal sum of 8000*l.*, and interest thereon, to the said *Mary Benson Jefferies*, her executors, administrators, and assigns.

On the 31st of October, 1825, *Mary Benson Jefferies* intermarried with *Henry Jordan*. Two settlements were executed by the parties prior to the marriage; the first by indentures of lease and release, dated the 30th and 31st days of October, 1825, the release being made between *Henry Jordan*, of the first part, *Mary Benson Jefferies*, of the second part, *Thomas Starling Benson*, and *Noah Slee*, of the third part, and *Thomas Starling Benson*, *Starling Benson*, *Richard Jordan*, the elder, and *Richard Jordan*, the younger, of the fourth part, whereby, after reciting the will of *Thomas Benson*, deceased, and his death, and that *Mary Benson Jefferies* had become entitled to the hereditaments devised by his will, the same hereditaments were released and conveyed unto *Thomas Starling Benson*, *Starling Benson*, *Richard Jordan*, the elder, and *Richard Jordan*, the younger, to hold to them, their [*74] *heirs and assigns, upon the trusts thereby declared, such trusts being for the separate use of *Mary Benson Jefferies* during her life, and, after her decease, for the benefit of *Henry Jordan* during his life, and, after the decease of the survivor, for the benefit of the children of the marriage. The release contained no recital of or reference to the bond, or to any assignment or settlement, of it.

By the second indenture of settlement, of the 31st of October, 1825, reciting that *Mary Benson Jefferies* was entitled to the sum of 8000*l.* secured by the bond, and to other personal estate; that, upon the marriage treaty, it had been agreed that the said sum of 8000*l.* should be settled, and that the other personal estate of *Mary*

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Benson Jefferies should become the property of the husband as her marriage portion, the said bond, and the principal and interest thereby secured, were assigned to *Thomas Benson*, *Starling Benson*, *Richard Jordan*, the elder, and *Richard Jordan*, the younger, upon trust to get in and receive the said principal sum and the interest thereof, and, after the marriage, to pay the interest unto *Mary Benson Jefferies* during her life for her separate use, and, in case she should die in the life-time of *Henry Jordan*, to pay such interest to him during his life, in case he should continue the widower of his then intended wife, and, after the death of the survivor, to stand possessed of the principal sum, upon certain trusts for the benefit of the children of *Mary Benson Jefferies*.

Thomas Starling Benson, who was the uncle of *Mary Benson Jefferies*, superintended the making of both settlements; but he, being one of the obligors of the bond, was not made a trustee of the settlement of the personal property. He informed his partners, the other obligors of the bond, of the intention [*75] to assign the bond to the trustees of the settlement, and that it was designed to give them a power to continue the money on the personal security of the obligors. It did not appear that any notice was given to the other obligors of the bond, of the fact that it was assigned to the trustees. The other surviving obligors, in their depositions taken upon the inquiry directed by the decree in the cause, stated that they had no recollection of receiving any distinct notice; but they had always an impression that the money thereby secured was settled upon the marriage. Immediately after the marriage, *Thomas Starling Benson* delivered the bond to *Richard Jordan*, the elder. *Richard Jordan*, the elder, died in the year 1831, and, after that event, the bond was transferred to the possession of *Richard Jordan*, the younger; and it was in his possession about two months prior to July, 1832.

In June, 1832, *Henry Jordan* applied to *Alexander Bell* for a temporary loan of money, upon the security of a bond of Messrs. *Meux & Co.*; and after several meetings had taken place on the

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subject, *Alexander Bell* consented, conditionally, to lend as many rupees as would amount, at the then rate of exchange in *India*, to the sum of 7000*l.*, in consideration of the acceptance of *Henry Jordan* for the repayment of that sum, and upon the collateral security of the bond, provided *Henry Jordan* produced satisfactory proof that he was beneficially entitled to the bond, and that it was not the subject of any settlement made upon his marriage. *Henry Jordan* afterwards produced the settlement of the real estate, and satisfied *Alexander Bell* that he had personally received the interest due on the bond from Messrs. *Meux & Co.* *Alexander Bell* thereupon drew on his agents, at *Bombay*, for the sum of 78,139 [*76] rupees; and the sum of 6186*l.*, the value of the bill at the then rate of exchange, was paid to *Henry Jordan*, who gave *Alexander Bell* his acceptance for the sum of 7000*l.*; and deposited with him the bond as a collateral security, with the following memorandum, signed by *Henry Jordan* :—

“I hereby undertake, when called upon so to do, at the expiration of six months from the date hereof, to assign to *Alexander Bell*, of &c., his executors, administrator's or assigns, a certain bond or obligation in writing, from *Meux & Co.* to Miss *Jefferies*, which bond is my property by right of marriage. The above sum of 8000*l.* was taken by Messrs. *Meux & Co.*, at the time of the 4 per cents. being reduced, in 1824. Dated 24th July, 1832. *Henry Jordan*.

“Witness, *Edmund Coates*.”

It did not appear by what means the bond and the settlement were abstracted from the possession of the trustees, and came to the possession of *Henry Jordan*.

Before the acceptance given by *Henry Jordan* for the sum of 7000*l.* had become due, *Alexander Bell* agreed to defer the payment of it until the 7th of March, 1833; on which day it was presented and dishonored. On the same day, *Alexander Bell*, by his solicitor, gave notice to the obligors that he had possession of the bond, and that he claimed to have a lien upon the same for the sum of 7000*l.* and interest.

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Proceedings at law having been commenced against the Plaintiffs, the obligors, to recover the money due upon the bond, they filed their bill of interpleader against *Alexander Bell, Henry Jordan, Mary Benson Jordan*, his wife, and the children of the marriage, and **Thomas Benson*, and *Richard Jordan*, [*77] the surviving trustees of the second settlement ; and by an order in the cause, made the 31st of January, 1834, the sum of 8000*l.*, and interest from the 5th of January, 1833, was brought into Court, and the dividends from time to time ordered to be laid out ; and an injunction was awarded to restrain the Defendants from bringing or prosecuting any action or actions against the Plaintiffs for the monies secured by the bond ; and also to restrain the Defendants, *Thomas Benson, Starling Benson*, and *Richard Jordan*, from prosecuting an action of trover commenced by them against *Alexander Bell* ; and the bond was ordered to be deposited with the Plaintiff's clerk in Court.

By the decree made the 12th of July, 1836, by the *Vice-Chancellor of England*, a reference was directed to inquire whether, on or before the 24th of July, 1832, *Thomas Starling Benson* knew of the settlement of the bond, the Defendant, *Alexander Bell*, not admitting that *Thomas Starling Benson* had notice of such settlement ; and the Plaintiff's costs were ordered to be taxed and paid without reference to the question by whom they were to be ultimately borne.

Alexander Bell appealed from so much of the decree as directed the inquiry, and, on the 7th of July, 1837, that part of the order was reversed ; and it was referred to the Master to inquire who was or were, on the 23rd of July, 1832, entitled to the bond, and the money secured thereby ; and how such person or persons became so entitled ; and under what circumstances the bond came into the possession of *Alexander Bell*.

The Master, by his report, certified that he had been *at- [*78] tended by the respective counsel and solicitors on behalf of the Defendants, the parties entitled under the second settlement,

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and the Defendant, *Alexander Bell*; and he found that the bond and settlements were duly executed by the several parties thereto. The Master, then, after stating that the several witnesses mentioned in the report, had deposed to certain facts thereby set forth, found, that, on the 23rd of July, 1832, *Thomas Benson, Starling Benson, and Richard Jordan*, as the surviving trustees named under the second settlement of the 31st October, 1825, were entitled to the bond and the monies secured thereby; and that the persons then beneficially entitled thereto, were the persons named in the trusts of the said settlement; and he found that the bond came into the possession of *Alexander Bell*, by the delivery to him of the same by *Henry Jordan*, as a collateral security for the sum of 7000*l.* advanced by him to *Henry Jordan*, under the circumstances stated in the evidence thereinbefore referred to.

Upon the hearing of the cause, the depositions referred to in the report were read, and the facts in the foregoing statement appeared upon such depositions. No exception was taken to the report, and the cause now came on for further directions.

Mr. *Temple* and Mr. *Tennant* for Mrs. *Jordan*, and the children of the marriage.

The case of the Defendant *Bell* is that of a purchaser of property which, on the face of it, appeared to have been the property of an unmarried woman, who had subsequently married; knowing moreover, that there was a settlement upon the marriage, and that one of the trustees of that settlement was also one of the [*79] obligors of the bond. The value of the property—the length of time during which it had remained on the same investment—and every circumstance attending the transaction, ought to have suggested to a purchaser of common prudence, the propriety of enquiry of the legal depositaries of the fund, before he advanced his money. The absence of such enquiries can be attributed only to what the Court will consider as wilful blindness. It is such laches as in a court of equity amounts to fraud. The total

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omission of all reference to this large sum of money, in the settlement of the real estate which was produced, was of itself sufficient to suggest the fact, that there must be another settlement, applicable to the personal estate, which was not produced; for according to the practice of conveyancers, if the money secured by this bond had been intended to be given to the husband, that fact would have been noticed in the settlement of the real estate; and this view of the case was in fact taken by the *Vice-Chancellor of England* when the cause was before him. The title to the bond of the parties claiming under the settlement of the personal estate is complete, and is found by the report. When the Master had adopted this finding, no objection was made by the parties interested in the settlement to the introduction of the other matters into the report, as they regarded all the other circumstances as wholly immaterial. It would be a dangerous doctrine to hold that an equitable title is infirm or incomplete, unless notice can be shewn to have been given to the parties in the mere legal possession of property. Even if notice were necessary, there is sufficient evidence in the depositions to shew that all the obligors of the bond who were surviving at the time of the examination, knew either of the actual settlement or of the intention to settle the monies secured by it.

*On the point of costs, they cited *Stevenson v. Anderson* [*80] (a), and *Seton's Decrees* (b).

Mr. Sharpe and Mr. Ellison, for the Defendant, Bell.

There will be great difficulty in acting upon this report. The object of the inquiry has not been obtained. The inquiry was, under what circumstances the bond came into the hands of the Defendant. The finding is, that it came into his hands under the circumstances mentioned in the depositions referred to in the report. The Court has not the benefit of the Master's judgment upon the facts which was the purpose of the reference, and it is uncertain what the true effect of the evidence is.

(a) 2 Ves. & B. 412.

(b) Page 341.

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Assuming that the Court will endeavour to act upon the report in its present shape, it does not appear by the depositions or the facts found, that the trustees of the settlement gave notice of their assignment to the obligors of the bond. Giving to the evidence its utmost effect, it amounts to no more than an intimation to the obligors that it was intended to settle the money due upon the bond, and not that it was actually settled. Knowledge of a mere intention does not amount to notice of the act: *Cothay v. Sydenham* (e). The knowledge which *Thomas Starling Benson* had of the bond, he did not derive by means of any notice from the parties whose duty it was to give that notice; nor did he receive it in his character of obligor. Even if his knowledge of the assignment amounted to notice to him, he was only one of the obligors; and notice to one of several trustees cannot be sufficient. If, for example, there were four trustees, one of whom had never acted in the trust, and [*81] resided abroad,—would it be competent to an assignee of the trust funds to pass by all the acting and resident trustees, and give notice to an absent one, unacquainted with the affairs of the trust?

In *Timson v. Ramsbottom* (b), the *Master of the Rolls*, after noticing the former cases, in which notice had been given to all the trustees—to all the surviving trustees, or, which was the same thing, to the solicitor of all the trustees, remarks upon *Smith v. Smith* (c), where notice to one was held sufficient, that “in that case, there might be circumstances to induce the Court to presume that the trustee who had notice communicated his knowledge to his co-trustees;” from which it is plain that he thought notice in some manner brought home to all the trustees or executors was necessary. If that be not so, where all the trustees are jointly, and no otherwise entitled, there is still a distinction in this case, for the bond is joint and several. In his several character, each obligor is a distinct holder of the fund, and cannot be affected without distinct notice.

Both of the parties are equitable claimants, the legal title being

(a) 2 Bro. C. C. 391.

(b) 2 Keen, 35.

(c) 2 Cro. & Mees. 231.

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in the husband, whose name must have been used at law to recover upon the bond. The agreement to assign the bond has in equity the same effect as an actual assignment. In the absence of any thing amounting to notice by the trustees of the settlement, at least until after notice was given by the Defendant, *Bell*, the latter is the first incumbrancer who has completed his title, and he is, therefore, entitled to the benefit of the rule *qui prior est in tempore potior est in jure*. He has, in fact, more than mere priority in time; for, until this Court interposed, he had actual possession of the bond: the *Court will not interfere to deprive a [*82] bona fide purchaser, without notice of any prior incumbrance, of the benefit of that possession: *Head v. Egerton* (a). They also cited *Foster v. Blackstone* (b); *Ex parte Watkins* (c); *Evans v. Bicknell* (d); *Ex parte Kensington* (e); *Ex parte Cawthorne* (f); and *Harrington v. Price* (g).

Mr. Burge, *Mr. Teed*, *Mr. Bacon*, and *Mr. Messiter*, for the trustees, were heard only on the question of costs.

There is no evidence that the trustees are in any respect blameable. They are entitled, therefore, to their costs either against the unsuccessful claimant, or out of the fund. The report was made in the absence of the trustees, the Master having decided that they were unnecessary parties to the inquiry; and it must, therefore, be taken most strongly in their favour.

Mr. Temple, in reply.

In all the cases in which a purchaser has acquired a title to a chose in action by assignment and notice, it has been derived from a party who, at some time, had himself a title to it. In this case, there was no instant during which *Henry Jordan* had any title to the bond.

(a) 3 P. Wms. 280.

(b) 1 Myl. & K. 297; *S. C.* 9 Bligh, N. S. 332, reported under the name of *Foster v. Cockerell*.

(c) 2 Mon. & Ayr. 348.

(d) 6 Ves. 174.

(e) 2 Ves. & B. 83.

(f) 2 Glyn. & Jam. 240.

(g) 3 B. & Adol. 170.

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Priority of notice is unimportant where there is no equality of title. Notice is here wholly immaterial; for the obligors of the bond are not trustees, they are mere debtors; and it has never been held necessary to give notice to a debtor. But the question in the cause is, in fact, concluded by the report; for the report [*83] finds, that, *prior to the deposit with *Bell*, the trustees were actually entitled to the bond, and the Money thereby secured; and that could not be the case, unless they had done all acts necessary to render their title complete.

VICE-CHANCELLOR :—

This is one of those cases in which one of two perfectly innocent parties must suffer by the default of a third. Unless the primary title of *Mrs. Jordan* and her children can be impeached, they will, of course, be held entitled in this Court to the money which is the subject of the suit.

I believe, that, prior to the decision in *Mr. Sturt's* case, which occurred in 1809 (a), it had never been held, that the mere omission of a person having an equitable interest in a fund, the legal property of which was in another, to give notice of that interest, would of itself give a puisne incumbrancer the priority; and I think it is apparent, upon the judgment in *Evans v. Bicknell* (b), that Lord *Eldon* at that time did not consider the mere omission to give notice, where the transaction was quite destitute of fraud, would have that effect. Sir *Thomas Plumer* also, in 1814, in the case of *Cooper v. Fynmore* (c), expressed clearly the law of the Court to be, that the mere omission to give notice would not postpone a prior to a puisne incumbrancer.

The case of *Wright v. Lord Dorchester* first raised the question, whether the omission of the first incumbrancer to give [*84] notice would be a reason for postponing him to *the second;

(a) *Wright v. Lord Dorchester*, 3 Russ. 49, n.

(b) 6 Ves. 190.

(c) 3 Russ. 60.

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but it did not decide the point: for, in that case, an injunction having in the first instance been granted to restrain *Brown*, who was the puisne incumbrancer, from receiving the dividends of the stock, which had been previously assigned to Messrs. *Wright*, Lord *Eldon* afterwards dissolved that injunction; but he put Mr. *Brown* on terms to account, at the hearing of the cause, for the dividends which he should have received, in case the Messrs. *Wright* or the trustees should be declared to be entitled to them; deciding only, therefore, that the Court would not, on an interlocutory application, hold that the puisne incumbrancer ought not to be preferred. That case also raised, or rather left open, another question: it appeared, that *Brown* had made very careful inquiries of the trustees; and, therefore, supposing that case to have been decided in *Brown's* favour, it would not follow that the decision would be in favour of a puisne incumbrancer, who had not made such inquiry.

I conceive it to be now clearly decided, by the cases of *Dearle v. Hall* (a), *Loveridge v. Cooper* (b), and *Foster v. Blackstone* (c), that if a bona fide incumbrancer upon a fund, the legal interest in which is in a trustee, gives notice of his incumbrance to the trustee, and neither the incumbrancer giving the notice, nor the trustee at the time of such notice being given, has notice of any prior incumbrance affecting the fund, the incumbrancer giving such notice, so long as the circumstances of the case remain unaltered, will be entitled to priority over a prior incumbrancer upon the fund, who has omitted or neglected to give notice of his incumbrance, although the puisne incumbrancer may have advanced his money without making previous inquiries of the trustee. [*85]

In the absence of notice, the party claiming the prior incumbrance has not perfected his title. In a case where there cannot be an actual transfer of the subject, he must do all that is in his

(a) 3 Russ. 1.

(b) Id. 30.

(c) 1 Myl. & K. 297; S. C. reported as *Foster v. Cockerell*, 9 Bligh, N. S. 232.

 1841.—*Meux v. Bell*.

power ; and if he fails to do this, and another person takes an incumbrance, and gives notice, the second person has acquired a perfect assignment, whilst the first equitable assignment is imperfect.

The case of *Foster v. Blackstone*, for the first time, I believe, called for direct adjudication on the question, whether the omission of the second incumbrancer to make the inquiry was to be treated as an objection of substance or not. In *Dearle v. Hall*, there having been, in fact, an inquiry, the reasoning of Sir *Thomas Plumer* was rather an exposition of what he thought the doctrine of the law to be, than a direct adjudication on the point. In the case of *Foster v. Blackstone*, the Lord Chancellor, in moving the judgment of the House of Lords, adverts and assents to the principle that a party, until he gives notice to the trustee, has not done every thing in his power, and which is necessary to complete his title (a). The reasoning of Sir *Thomas Plumer*, that the first incumbrancer, by omitting to give notice, has not acquired that which, in equity, is equivalent to possession at law, and, therefore, his security is not perfected, is directly affirmed by the House of Lords, in a case where the very point was argued, and the distinction with regard to inquiry taken by counsel at the bar ; and where no inquiry was made, the second incumbrancer was preferred to the first, on the ground that the first incumbrancer had not perfected his security.

['86] "I think these decisions are founded on principle. The omission of the puisne incumbrancer to make inquiry cannot be material where inquiry into the circumstances of the case could not have led to a knowledge of the prior incumbrance.

The question is, whether the inquiry, if it had been made, would or would not have informed the puisne incumbrancer of any material fact affecting his interest. If his conduct would have been the same, whether he had made the inquiry or not, the omission of the inquiry cannot be a reason for depriving him of the benefit of his subsequent vigilance.

(a) *Foster v. Cockrell*, 9 Bligh, N. S. 376.

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The only suggestion which, it appears to me, can be made in answer to this view of the question, is, that if the puisne incumbrancer has not made any inquiry, he has not, in point of fact, been deceived or injured by the neglect or omission of the prior incumbrancer. But there is a fallacy in that way of stating the case. If the puisne incumbrancer advances his money bona fide, without inquiry, it must be presumed that he would equally have advanced it after inquiry, the result of which would have negatived the existence of any prior incumbrance. The injury he sustains, and which gives him priority, is *ex post facto*. If, after advancing his money, he is informed that there is a prior incumbrancer, he will immediately use diligence to get in or secure his property. If, on the other hand, he is not told, when he gives the notice, that there is a previous incumbrance, he is led to suppose that his security is good; he relies upon it, and he is injured in having placed such reliance upon it, if it should appear that there is a prior incumbrance. The notice, which, when it is given, has the effect of inquiry, is given either at the time the money is advanced, or afterwards, and the only distinction between the two cases is [*87] a distinction between a party who advances money at the time of taking a security, and a party who takes a security for an antecedent debt. The notice which the puisne incumbrancer gives converts the trustee of the fund into a trustee for the party giving the notice. *Dearle v. Hall*. The credit which the puisne incumbrancer gives to the fund after the notice, is as good a consideration as that of any other creditor who takes a security for an antecedent debt, which is clearly sufficient. *Plumb v. Fluitt* (a). And the puisne incumbrancer has a better equity than the earlier incumbrancer, because the former by notice to the trustee has perfected his equitable title, which the latter, by omitting or neglecting to give notice, has not done.

The next question which has been suggested is, whether the first incumbrancer, in order to perfect his security, must, where there are several trustees, give notice to all of them? If notice to all is

(a) 2 Anst. 432.

 1841.—*Meux v. Bell*.

necessary, I am unable to discern upon what principle notice to one can be deemed insufficient. If the case of *Smith v. Smith* has determined that notice to one trustee is sufficient, I should not exercise a sound discretion, if I were to create any doubt upon that point.

Another question is on the nature of the notice. It was said, in argument, that it did not appear that the notice was given for the purpose of affecting the trustee with notice of the settlement. If the trustee had said, that the fact came to his knowledge in one transaction, and he had forgotten it at the time of the other, there might be reason for the distinction which has been attempted to be [*88] made, with regard to the manner in which the trustee gained his information. In such a case, there might be a distinction between knowledge which is the result of express and pointed instruction, and notice which is derived from casual information. If the trustee has actual knowledge at the time the transaction takes place, I have always understood the principle of law to be, that what a man knows for one purpose he knows for all ; and you do not inquire whether he learnt it in one character or in another.

In the case of *Smith v. Smith*, *George Robert Smith*, who had married a daughter of Mr *Maberly*, had advanced monies to him, and had taken an assignment of Mr. *Maberly's* life-interest in certain stock under his marriage settlement. *John Smith*, his uncle one of the trustees of the fund, was, in conversation only, informed by *George Robert Smith* of the fact of his having obtained a security on the fund ; and *John Smith*, therefore, deposing to the fact that he knew it, the Court in effect said, if a trustee knows it,—however he might have learnt it,—the second incumbrancer would have been safe if he had made the inquiry.

In *Timson v. Ramsbottom (a)*, there were several trustees and executors : a son of one of them sold or mortgaged his interest in part of the property to his father. The father died, and then the question was, whether the surviving executor, who never, in fact, had heard of the dealings with the father, was to be taken to have notice of

(a) 2 Keen, 35.

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that transaction, as a conclusion of law. The *Master of the Rolls* held, notice to one executor of that transaction, was not notice to all and having got rid of the technical objection, that notice to one, is notice to all, the question was reduced to this :—“at the time when the second incumbrancer took his security, was there ['89] any person living who had notice of the prior incumbrance being created? The Court, in that case, had ascertained, that, if the party had made inquiry, he would have obtained no information whatever as to the fact of a prior incumbrance. It appeared that the trustees or executors, in point of law, were not affected constructively by the notice given to a deceased co-executor, and there being no notice, in fact, Lord *Langdale* has added the weight of his authority to the former decision of Sir *John Leach*, in *Foster v. Blackstone*, confirmed by the House of Lords, that the inquiry is perfectly immaterial, if, in point of fact, at the time of the inquiry, there is no existing notice; and that I conceive to be the law of the Court on the subject.

Taking this principle as the basis, if, on examining what appears in the Master's report, and also the cases as to notice, I find that notice of the settlement has been communicated to one of the obligors, my opinion is, that the decision must be in favor of the parties claiming under the settlement.

It has been argued, that Mr. *Bell* had a legal right or a legal advantage in the possession of the bond; and where that is so, it is said, on the authority of *Head v. Egerton*, the Court will take no step to deprive him of that right or advantage. In that case, the Court said that there was no equity to take from a second mortgagee the title-deeds, which the first mortgagee had incautiously permitted the mortgagor to pledge a second time. The same principle has been repeatedly affirmed (a). It does not follow, because the mortgagee has not the estate for which his money was ['90] paid, that the title-deeds are, therefore, of no value to him. If the consequence of Mr. *Bell* having this bond in his possession

(a) See *Walwyn v. Lee*, 9 Ves. 34. Per Lord Eldon.

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would have been to prevent the persons entitled in equity from using, either under a power in the assignment, or under the direction of this Court, the name of the obligee. in an action to recover on the bond ; or, if they would have been unable to recover on the bond without producing it, and there were no means of obtaining the production of it by *Mr. Bell*, by calling him as a witness, or otherwise, there might be a difficulty. There is, however, no doubt that a party may recover on a bond, without the bond being produced in a Court of law.

If both of the claimants of the fund could have sustained their title at law, possession could only have been recovered by one of them ; and if there had been no interpleader, it might have depended on the time or manner in which the actions were prosecuted. Where both titles are equitable, the Court will not permit the right to be so determined. The obligors of the bond, coming, as they had a right to do, to be protected from conflicting actions, have placed the subject of the suit equally out of the reach of both parties. It is very different from a case where one purchaser has the estate and the other the title-deeds. I do not conceive that there is any use which *Mr. Bell* could make of the bond, either to recover himself, or to prevent the other claimants from recovering. The case can only be determined upon the equities of the parties.

Then, as to the question of notice, I shall endeavor to decide the case upon the materials which the report affords, although the frame of that report is not very convenient. The Master does not find the circumstances abstracted from the depositions, but he finds that the facts occurred under the circumstances referred to in [*91] the *depositions. The circumstances are, in fact, left entirely at large. Nothing is farther from my intention than to speak disrespectfully of this report ; for I believe it has not been unusual to deal with references in this manner. The 48th of the New Orders of August last was designed to lay a foundation for a practice more precise and uniform, and better calculated to assist the Court in such cases.

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I take this occasion to observe, that I have great difficulty in understanding how the misapprehension can have arisen, which is said to exist in the Masters' offices respecting the object and effect of the 48th Order (a). When the Court sends a case to the Master for inquiry as to the circumstances under which a transaction took place, the object of the Court is, that the Master may, (as far as he can), find facts on the face of the report on which the Court may afterwards act, as it would do upon a special case. And the security of the suitor seems to require that this should be done. If that course be taken, and the Master finds facts not warranted by the evidence, the suitor may except to the report; and the facts upon which the Court is to pronounce its judgment are thus accurately found. But if the Master, instead of doing this, simply examines witnesses and then reports to the Court that he has so examined witnesses, that they have made certain depositions, and that the transactions to which the inquiry relates took place under the circumstances stated in those depositions; if, (I say), ['92] the Master instead of finding facts upon which the Court may afterwards found its judgment, and to which finding the parties may except, simply sends up the depositions for the Court to make such use of as it can; it must, in many cases, greatly embarrass the Court, from not knowing what the facts are which it can really assume as proved. The Master, in effect, is returning the cause to the Court for the Court to do that which it required the Master to do, and that at a great risk to the interests of justice. Suppose the Master had, in this case, found, that, upon the evidence laid before him, each or all of the obligors in the bond had express notice of the settlement, Mr. *Bell* would, probably, have excepted to the Master's report as containing a finding not warranted by the evidence; and the case would have been disposed of upon his excep-

(a) August 26th, 1841. Order XLVIII. "That, in the reports made by the Masters of the Court, no part of any state of facts, charge, affidavit, deposition, examination, or answer, brought in or used before them, shall be stated or recited. But such state of facts, charge, affidavit, deposition, examination, or answer, shall be identified, specified, and referred to, so as to inform the Court what state of facts, charge, affidavit, deposition, examination, or answer, were so brought in or used."

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tion, the Court having the fact of notice or no notice ascertained, as the ground upon which its decree was to be founded. But if the evidence is merely sent up to the Court generally, without any finding, the parties have no opportunity of knowing what the precise grounds are on which the judgment is to proceed. And where, as in this case, much of the evidence is not admissible, and its effect questionable, and actually controverted, the Court may find itself positively unable to act, if the Master, instead of finding facts from the evidence, refers the Court generally to the evidence to make out a case for itself.

Before the 48th Order was framed, the invariable practice in some of the Masters' offices was to do the very thing which I have said the Court desires when it sends a case like this to the Master for inquiry, and further to assist the Court, (and great that assistance often is), by stating the Master's reasons for the

[*93] conclusion he has come to. In other offices, the *practice sometimes was to state or recite in their reports the actual proceedings before them; namely, the states of facts, charges, affidavits, and other proceedings mentioned in the 48th Order. There is nothing in the 48th Order to prevent the Master from finding facts from the evidence before him, and stating those facts in his report, or from stating the reasons upon which he has proceeded in making his report; or from submitting any question to the Court upon which the powers with which he is armed do not enable him to come to a satisfactory conclusion; or, generally, from giving the Court an account of the effect produced upon his own mind by the proceedings before him. There is nothing in the 48th Order to prevent the Master from doing any of these things; the order only rejects the practice of stating and reciting in the report the documents mentioned in the order.

Having taken a part both in suggesting and framing the 48th Order, I am able, with certainty, to say that Lord *Cottenham* never intended by that order to prevent the Masters from doing any thing in their reports, which, before that order it was competent for them to do, except stating and reciting in their reports states of facts and

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charges, and the other documents mentioned in the 48th Order. Lord *Cottenham* thought, and not without reason, that the statement of such documents in reports tended to load the suitor with expense, without giving the Court the assistance it required. What the Court wants is the Master's conclusion from the evidence, and a reference to, or description of, the evidence, so that the Court may know what the evidence was, and judge whether the Master's conclusion was borne out by that evidence or not.

It may be observed, that the 48th Order does *not prohibit the Master from stating or reciting wills, deeds, and many other documents. That was done advisedly, because wills, deeds, and many other documents, being the private property of parties, which they have a right to keep in their private custody, do not remain in the office to be referred to after the report is made ; whereas states of facts, charges, and the other matters specified in the 48th Order remain in the office. The order was framed with great care and consideration ; and I entertain no doubt of the benefit to be derived from it. I will read the report and the evidence before I give my final opinion upon the question of notice. [*94]

VICE-CHANCELLOR :

The subject of this suit, which is an interpleading suit, is a bond dated the 5th day of July, 1824, by which certain persons, including *Thomas Starling Benson*, became jointly and severally bound to *Mary Jefferies*, now *Mary Jordan*, in the penal sum of 16,000*l.*, with a condition for making the bond void on payment of 8000*l.* and interest.

Upon the marriage of *Mary Jefferies* with *Henry Jordan* in the month of October, 1825, the bond was assigned to trustees upon trusts, in which *Mary Jordan* and her children, who together, constitute one class of Defendants in this suit, are interested ; *Henry Jordan*, the husband, also taking a life interest in the money secured by the bond, intermediate between the life interest of the children.

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The bond, by means which did not appear, came into [*95] the possession of *Henry Jordan* ; and in the year 1832, the Defendant *Bell* advanced money to *Henry Jordan* upon the security, (amongst other property), of the bond in question, upon the faith of a representation made by *Henry Jordan* to the Defendant *Bell*, that his wife's real estate had been settled upon her and her children, and that the bond had become his (*Henry Jordan's*) property. To confirm the truth of this statement, *Henry Jordan* produced to *Bell* a settlement made on his marriage with the Defendant *Mary Benson Jordan*, containing a settlement of her real estate upon herself and her children, and which *Henry Jordan*, contrary to the truth, represented to *Bell* to have been the only settlement made upon the marriage. Upon the credit given by *Bell* to this statement, and after some further inquiries which *Bell* made respecting *Jordan's* character, but without any inquiries by *Bell* of the obligors in the bond, the money was advanced by *Bell* to *Henry Jordan*.

In the month of March, 1823, *Bell*, by his solicitor,* gave notice of his security to the obligors of the bond ; and the question in the cause is, whether the better equitable title to the money secured by the bond is in *Mrs. Jordan* and her children, or in the Defendant *Bell*.

The question upon which I reserved my judgment, and the only question now before me, is, whether at the time when Mr. *Bell* gave notice of his incumbrance to the obligors in the bond, such a notice of the marriage settlement of *Mrs. Jordan* had been given to the obligors, or any of them, as would deprive Mr. *Bell* of the benefit of the rule of law which I stated on a former day.

In the Master's report, which I have referred to for [*96] *the purpose of finding the answer to this question, I find the evidence of Mr. *Thomas Starling Benson*, one of the obligors, who deposes that he had notice at the time of *Mrs. Jordan's* marriage that the bond was settled upon her and her children.

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This testimony is direct and positive. I see no reason for questioning its credibility, and it is unopposed by any conflicting evidence.

If, in order to come to a conclusion in this cause upon the question of notice, it were necessary to fix the other obligors in the bond with notice, I should have great difficulty in acting upon the Master's report as it now stands. But being of opinion that the notice which Mr. *Thomas Starling Benson*, one of the obligors in the bond, is thus proved to have had of the marriage settlement, is sufficient to enable me to decide this cause, I am enabled to proceed without further inquiry.

In *Smith v. Smith (a)*, the full Court of Exchequer, of which the present *Lord Chancellor* was then the head, decided the very point of notice which arises in this case. By that decision I should probably feel myself bound, even if I doubted its correctness. But for the reasons given in the judgment in that case, my individual opinion approves the principle upon which the case was decided, and those reasons admit of no distinction between a joint bond and one which is joint and several.

The case of *Smith v. Smith* does not impeach, nor is it impeached by the case of *Timson v. Ramsbottom*. In *Smith v. Smith*, the Court of Exchequer decided that notice to one trustee was sufficient, at least so long as that trustee lived, and the circumstances of the case remained unaltered. The reason why notice to one was held sufficient was, because nothing less than in- [*97]
quiry of all the trustees would satisfy a prudent inquirer. Inquiry of all would, in the circumstances of that case, have led the inquirer to a knowledge of the prior incumbrance, and the property, therefore, was not in the order and disposition of Mr. *Maberly*. The Court did not decide, that if the trustee, to whom alone notice was given, had died before Mr. *Maberly's* bankruptcy, and no new

(a) 2 Cro. & Mea. 231.

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notice had been given before the bankruptcy, the property would not have again fallen into the order and disposition of Mr. *Maberly*; nor, I conceive, could such a proposition be maintained; for, in the altered circumstances which the death of the trustee, who alone had notice, would have introduced, inquiry of all the existing trustees would not have led the inquirer to a knowledge of the previous incumbrance, and the reasoning of the Court in *Smith v. Smith* would no longer apply. *Timson v. Ramsbottom* supports this reasoning, and leaves *Smith v. Smith* untouched. Lord *Langdale* did not there decide, that, if the trustee or executor, who in that case had notice, had been living at the time when the second incumbrancer gave notice of his incumbrance, the notice which that trustee or executor had, would not, in such circumstances, have been sufficient. He decided only, that there was no sufficient notice of the first incumbrance at the time when notice of the second incumbrance was given: and, undoubtedly, at that time there was no sufficient notice of the prior incumbrance, for inquiry of all the then existing trustees would have been unavailing. Both the cases treat the question of notice, as such a question ought to be treated,—as a question of substance. In *Smith v. Smith*, inquiry would, in the circumstances of that case, have led to a knowledge of the prior incumbrance, and the notice was, therefore, properly held sufficient. In *Timson v. Ramsbottom*, inquiry would not have led to a knowledge of the prior incumbrance, and the notice was properly held insufficient. I entirely concur in the principle of both those decisions.

My judgment in this case must, therefore, be in favour of Mrs. *Jordan* and her children, except to the extent of *Henry Jordan's* interest, if he should survive his wife. To this extent Mr. *Bell* has a lien upon the fund.

The only question which remains to be decided is, by whom the costs of this suit are to be borne. If *Henry Jordan* were here and of ability to bear those costs, there would, of course, be no question as to the party upon whom the expenses occasioned by his iniquities

 1841.—*Scotson v. Gaury*.

would be thrown. I cannot throw them upon the fund, for that would be to make the wife and children of *Henry Jordan* pay for his transgressions. I cannot give Mr. *Bell* his costs, because, independently of his failing in the suit, he cannot allege that he was originally induced to part with his money upon a security to which the possible negligence of the trustees or some of the trustees of the settlement gave a false credit, for inquiry at the time of advancing his money would have saved him from the loss to which my present decision will subject him. I cannot, upon the evidence now before me, acquit the trustees of the settlement of all possible blame in the transaction; for, upon the evidence before me, it is wholly unexplained how the bond and settlement of the real estate came into *Henry Jordan's* hands. I must, in respect of costs, do that which Sir *Thomas Plumer* did in *Dearle v. Hall*, give no costs between the Co-Defendants *Bell* on the one side, and the *Jordans* on the other. The Plaintiffs must have their costs out of the fund. This order will not prejudice the claim of the trustees of the settlement to have their costs out of the trust fund, if they can shew that the bond and settlement got into *Henry Jordan's* possession without their default. I desire to be distinctly understood as giving no opinion unfavourable to the right of the trustees to receive their costs.

 *SCOTSON v. GAURY.

['99]

December 2, 3, 4, 9, and 10.

It is not the practice of the Court to look into the answer to an injunction bill, for the purpose of determining whether the answer is sufficient, without exceptions having been previously taken thereto, notwithstanding the answer may be filed so near the day of trial, that it is probable the trial will be had before the proceedings can be stayed by the result of a reference in the usual course. If the answer were a mere pretence and evasive, it might be otherwise.

If, in such a case, the answer is excepted to for insufficiency, the Court will look into the exceptions and the answer, instantan, without referring them.

Where the Master has certified the Defendant's answer to be insufficient, the Court, notwithstanding the Plaintiff has been dilatory in his application for the injunc-

1841.—*Scotson v. Gaury.*

tion, will, on the eve of the trial, look into the answer and the exceptions, *instanter* to determine if the answer is evasive.

Where the action was commenced the 11th of August—declaration delivered the 28th of October—bill filed the 8th of November—common injunction issued the 24th, and the motion to extend made the 2nd of December,—the trial being to take place in the sittings beginning the 6th of December, and it appearing that the Plaintiff knew of the cause of action from its commencement,—it was held, that the application to stay trial was too late.

Semle—The affidavit of materiality by the Plaintiff himself cannot be dispensed with, on the motion to extend the common injunction, unless sufficient reason for the absence of such affidavit be assigned.

On the 11th of August, 1841, the Defendants brought their action in the Court of Exchequer, against the Plaintiff in Equity, to recover the sum of 1087*l.* 6*s.* 8*d.*, upon a bill of exchange, of which the Plaintiff was the drawer. The declaration was delivered on the 28th of October.

On the 8th of November, the Plaintiff filed his bill; whereby he stated, that, having offered to pay fifteen shillings in the pound, in respect of his debts, all his creditors, (except his bankers, who agreed to take seventeen shillings and sixpence in the pound), other than the Defendants, accepted the composition, and received bills of exchange in payment thereof; but that the Defendants refused to execute the composition deed, unless, in addition to the bills of exchange for the amount of the composition, the Plaintiff gave them two other bills of exchange, one for 200*l.* and another for 150*l.*, and also permitted them to retain a quantity of goods; and that the

Plaintiff gave the Defendants such other bills of exchange,
[*100] (which had become due and been paid *before the 9th of

August, 1841), and also allowed them to retain the goods; whereupon the Defendants executed the composition deed, and received two bills of exchange each for 1087*l.* 6*s.* 8*d.*, in respect of their debt; the first of which, dated the 6th of May, 1841, and payable three months after date, became due on the 9th of August, and was the subject of the action. The bill charged that the transaction, as to the goods and the two former bills of exchange, was in fraud of the composition, and illegal; and prayed a discovery, and the injunction to restrain the action, and also relief.

 1841.—*Scotson v. Guary*.

The Defendants appeared. On the 24th of November, the Plaintiff obtained the common injunction for want of answer; and he gave notice of motion for the 2nd of December, being the first seal after Michaelmas Term, to extend the common injunction to stay trial.

The motion was supported only by the affidavit of the Plaintiff's solicitor, who deposed that the Plaintiff quitted London on the 23rd of November, upon a journey for his employers, into Ireland and Scotland, and was not likely to return for ten days or a fortnight; that the deponent was the attorney of the Plaintiff in the defence of the action at law, and had made diligent inquiry into the circumstances under which the three bills of exchange were given; that the action was entered for trial at the adjourned sittings after Michaelmas Term, in London, which would commence on the 6th of December; and that he believed the answer would afford material evidence for the defence at law, and would shew that the bill of exchange was void in the Defendants' hands, and furnish a good defence to the action; and that the Plaintiff could not safely go to trial without it.

*In the evening of the 1st of December, the Defendants [*101] filed their answer.

Mr. *Randell* in support of the motion to extend the common injunction, applied to the Court, on the ground of the answer having been so lately filed, to look at the answer, without exceptions, for the purpose of determining whether it was insufficient, according to the course taken in the case of *Munnings v. Adamson* (a). He cited also, *Thompson v. Byrom* (b). In *Raphael v. Birdwood* (c), Lord *Eldon* said, he would follow the example of Lord *Hardwicke*, and himself examine the bill and answer (d). The practice was necessary to prevent gross injustice in cases where there was not time for the usual form.

It was not meant that the Court should examine the answer

(a) 1 Sim. 510.

(b) 2 Beav. 15.

(c) 1 Swans. 228.

(d) *Id.* 234.

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minutely, but only so far as would enable the Court to say whether it was or not substantially sufficient.

VICE-CHANCELLOR :

When this case was mentioned yesterday, I was strongly impressed with the belief that the practice of the Court had not been in accordance with the course which Sir *Anthony Hart* is reported to have taken in the case of *Munnings v. Adamson*. There are many other cases in the books in which the same reasons of hardship on the Plaintiff in Equity, and the same apparent necessity for the Court to look into the answer must have existed, as in the case of *Munnings v. Adamson*; yet in no other case does it appear that the Court ever took upon itself, without exception before it, to examine the answer, and decide upon its sufficiency. I have referred to the cases of *Whitehouse v. Hickman* (a), *Ibbetson v. Booth* (b), *Bruce v. Webb* (c), and *Bishton v. Birch* (d). I also find, upon inquiry, that the most experienced Registrars have no knowledge of any such a practice as that which I am desired to follow upon the authority of *Munnings v. Adamson*. In addition to the cases which I have mentioned, I have been referred to that of *Thompson v. Byrom*, but I do not find that Lord *Langdale*, in that case, followed, or had occasion to follow, the precedent of *Munnings v. Adamson*. If it had appeared that it was the practice of the Court to do that which I am now asked to do, I should, of course, have been bound to follow that practice; but that certainly does not appear. Very serious objections would, in my opinion, attend such a practice. If the plaintiff delivers exceptions, the defendant may put in a further answer, and give the discovery which is sought, and save his opportunity of immediately proceeding to trial. On the other hand, if the Court takes up the answer and merely says it is insufficient, without defining in what particulars it is so, which it cannot adequately

(a) 1 Sim. & St. 102. (b) Id. 103. (c) 2 Mer. 474. (d) 1 Ves. & B. 366.

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do, without exception being taken, there are no means within the practice of the Court by which the defendant can file a further answer, and thereby relieve himself from the injunction. Nor has he the means of combating the opinion of the Court upon the very question of the sufficiency of the answer. It was suggested that the Court might put the plaintiff upon the terms of filing exceptions *instanter*, but he may not be able, even if willing, to do so in time to admit of a further answer being filed before the day of trial; in the mean time, the action is restrained by the injunction. This is not just, unless the defendant is in some default. [*103]

I cannot infer from the dates of the several proceedings at law, and in this Court, that the Defendants have been guilty of delay or negligence in not sooner putting in their answer. There may have been no more delay than was unavoidable; and the fault may have been with the Plaintiff. If it were suggested to me that the answer was plainly evasive, or an abuse of the rules of the Court, as it would be, for example, if a Defendant, for answer, said, "he submitted he was not bound to answer;" in that case, I should have no difficulty in taking notice of its insufficiency, and treating it as a nullity. Cases of that kind do not often occur; and it is not suggested that the present case is one of them.

THE case was mentioned again, and the VICE-CHANCELLOR said, that if the Plaintiff, on examining the answer, should be advised to take exceptions to it, he would hear the exceptions *instanter*.

The cause at law was made a special jury cause. On the 4th of December, the Plaintiff excepted to the answer for insufficiency, and obtained the order referring the answer and exceptions. On the 8th, the Master certified the answer to be insufficient. The 9th of December, being a seal day, the motion to extend the injunction was renewed.

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Mr. *Randell*, for the motion.

[*104] Mr. *Wood*, for the Plaintiff at law, objected, first, *that the affidavit of materiality was made by the Plaintiff's solicitor only, without a sufficient reason being assigned for the same not having been made by the Plaintiff himself. *Spalding v. Keely* (a). Secondly, that the application to stay trial came too late, being on the eve of the day on which the trial was expected to take place. *Thorpe v. Hughes* (b); *Field v. Beaumont* (c). He also said, that, though the exceptions had been sustained before the Master, the whole material discovery sought by the bill had been in fact given; and the answer, if insufficient, which he did not believe to be the case, could only be insufficient on some merely technical ground.

VICE-CHANCELLOR:—

The facility with which the Court allows injunctions to be obtained to stay proceedings at law is such, that it is bound to look at its own practice with strictness. The Plaintiff files his bill, which it may be impossible that the Defendant should answer in the time prescribed by the practice of the Court. At the expiration of that time, the common injunction issues as of course, and the Plaintiff is at liberty to move upon an affidavit, which, by the practice of the Court, the Defendant is not allowed to answer, to extend the common injunction to stay trial. The Court, therefore, is bound to see that the Plaintiff, who claims the benefit of such a practice, shall give the Defendant the benefit of every safeguard which has been established for his protection.

The Plaintiff is required to make or join in the affidavit
[*105] upon which the common injunction is extended, *to stay trial, unless a sufficient reason can be assigned for his not doing so. And although the Plaintiff may not, perhaps, be the best possible person to judge of the materiality of the discovery to be ex-

(a) 7 Sim. 377.

(b) 3 Myl. & Cr. 742.

(c) 1 Swans. 204.

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pected from the answer, there are very adequate reasons why the Court should not, without sufficient excuse, dispense with an affidavit from him. No man, certainly, who has any regard for the sanction of an oath, would swear that he expected material discovery from the Defendant, if he knew that in truth he could have no defence to the action. The rule of the Court, therefore, being that the Plaintiff is the proper party to make the affidavit, which, in this case, he has not done, I must consider whether the excuse made by his solicitor for him is sufficient. The excuse is, that he went away on a given day. But when I look at the dates, I find that he left London on the 23rd of November. There was, therefore, from the 17th to the 23rd, an interval of several days, during which he might have made the requisite affidavit in support of this application. It is not shewn, that he was under any necessity of leaving London, or if such necessity existed, why he did not make the affidavit before he went. I am asked to treat the affidavit of the solicitor as a compliance with the rule of the Court, although it is manifest, that the solicitor may believe what he swears to be true, and the client know it to be false. In the circumstances of this case, I should hesitate upon admitting the sufficiency of the affidavit. Upon this question, however, which was the first point argued on behalf of the Defendants, I do not feel obliged to give a decided opinion.

The Defendants next allege, that it is to the delay on the part of the Plaintiff in the institution and prosecution of this suit, that the present pressure upon him is attributable. By the Plaintiff's own case, it appears, *that an arrangement had [*106] been going on with respect to the other two bills of exchange mentioned in the pleadings. This bill of exchange was due on the 9th of August. The action was brought on the 11th August. The present bill was not filed until the 8th of November. How is that interval accounted for? By a suggestion that the Plaintiff might not have known what was the cause of action. His own statement is, that he gave certain bills of exchange, and that he had made arrangements for the payment of two of those bills of exchange, one of which had become due in the beginning of August. The third bill became due on the 9th of August. The action was

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brought on the 11th, in which the declaration was delivered on the 28th of October. Am I upon this statement, to make an intendment in the Plaintiff's favour, that, having this action brought against him, he did not know what the cause of action was, when he does not tell me by his affidavit that such was the case, or that he had any other dealing with the Plaintiff at law, to which the action could have been referred? I think upon the affidavit, I must plainly understand that he did know the cause of action. His affidavit is defective, therefore, in not accounting for the time from the 11th of August to the filing of the bill. After the bill was filed, there was at least some delay. The Plaintiff was aware that proceedings against him were going on. There is no suggestion of surprise. On the 17th of November he was in a condition to apply for the common injunction, and so soon as that was obtained, he might have applied to extend it to stay trial. He was bound to take notice of the difficulty he would impose upon the Defendants, if he delayed his application until the eve of the trial. In this state of circumstances, he allows time to elapse, wholly unaccounted for, from the 17th until the 24th of November, before he makes his [*107] application for the common injunction. The consequence of that loss of time, at this critical period, is the very pressure complained of. Coupling this with the other circumstances of the case, I should not be straining the rule of the Court, if I were to hold the present application to be too late.

If the answer is reported insufficient by the Master, the Court takes it to be so, unless the certificate is excepted to: and, accordingly, I take this answer to be insufficient. But being prepared to decide this case in favour of the Defendants, upon the second point he has made, it is in the Plaintiff's favour that I propose to look at the answer. For if I find the Defendants mis-conducting themselves by evasion in their answer, I may set off that act against the dilatory conduct of the Plaintiff. I will, therefore, look into the answer.

[The answer and the exceptions were handed up.]

1842.—Snell v. Crocker.

The VICE-CHANCELLOR having read the Defendants' answer to the matter of the exceptions, said, there was, perhaps, a technical insufficiency in the answer, but it gave substantially the discovery sought. He, therefore, refused to extend the injunction to stay trial.

GREGORY v. GREGSON.

1841: December 9.

An appearance cannot be entered for a Defendant under the 8th Order of August, 1841, where the subpoena was served before the Orders of August, 1841, came into operation, and was, therefore, not served according to the 14th Order.

MR. *Faber* moved to enter an appearance for the Defendant under the Order VIII. of the 26th of August, 1841. He stated that the subpoena had been served on the 9th of September, 1841, but expressed a doubt, whether the motion could be granted with reference to the XIVth of the same Orders, specifying the form of memorandum to be inserted at the foot of the subpoena, after the last day of Michaelmas Term, 1841, when the Orders came into operation.

The VICE-CHANCELLOR refused the motion.

SNELL v. CROCKER.

1842: January 12.

Leave to file a note under the 21st Order of August, 1841, will not be given where the subpoena to appear and answer was not served under the 14th Order.

THE subpoena to appear and answer, was served upon the Defendant on the 3rd of May, 1841.

 1841.—Bowser v. Colby.

Mr. *Teed* moved, under the Order XXII. of August, 1841, for liberty to file a traversing note under the Order XXI.

The VICE-CHANCELLOR said, that the Defendant had not that notice of the consequences which the memorandum at the foot of the subpoena, under the 14th Order, would have given him, and he refused the motion (*a*).

[*109]

*BOWSER v. COLBY.

1841 : December 18, 19, 20, 24 ; November 8, 11.

A lessee applying to redeem a lease, which has become forfeited at law by non-payment of rent, is not required by the statute 4 Geo. 2, c. 28, s. 3, before the hearing, to pay into Court the arrears of rent or the costs at law, if no injunction is granted until the hearing, and the lessor is in possession.

Where the suit to redeem the lease was brought by the personal representatives of the lessee, evidence having been given, tending to shew, that the lessee in his lifetime was insolvent, and had committed breaches of covenant, and that his estate was also insolvent, the Court directed an issue to try whether other breaches of covenant had been committed or waived, but imposed it as a term upon the Plaintiff that he should previously pay into Court, the costs at law and the arrears of rent due at the time the lessor sued out his writ of possession.

The arrears of rent and amount of costs brought into Court by the Plaintiff, in a suit to redeem a lease forfeited by non-payment of rent, must, if the bill is dismissed, be repaid to the Plaintiff.—*Semble*.

Equitable agreements, charging the property comprised in a lease, but not accompanied with a change of possession or other alteration of the property, do not work a forfeiture of the lease in equity, notwithstanding there is a clause in the lease against assignment.—*Semble*.

A court of equity, when asked by a lessee to grant him relief, will consider the conduct of the lessee in dealing with the property, whether that conduct does or not involve a breach of covenant.

A lease provided, that, in case of any breach of covenant, it should be lawful for the lessor to re-enter and expel the lessee, and the lease should, in that case, be forfeited, and be utterly null and void. The lessee committed a breach by non-payment of rent.—*Semble*, such a lease is voidable and not void.

A court of equity will relieve a lessee from a forfeiture by non-payment of rent,

(*a*) *Dumeryus v. Mullins*, 20th Jan. 1842*. Similar motion refused, on the like ground. On appeal to the Lord Chancellor, motion refused for the same cause, 28th Jan. 1842.

 1841.—*Bowers v. Colby.*

where there is a proviso that in that case the lease shall be void, as well as where there is a mere power of re-entry.

A deed proved by the attesting witness viva voce at the hearing is well proved for all purposes in the cause, unless it is impeached.

SIR *Hugh Owen*, by indenture of lease, dated the 19th of September, 1807, demised unto *George Bowser*, the elder, his executors and administrators, the veins and seams of coal and culm under certain lands in the parish of *Pembrey* in the county of *Cardmarthen*, with the usual powers for opening and working the same, for the term of fifty years from Michaelmas, 1807; rendering unto Sir *Hugh Owen*, his heirs and assigns, one-sixth part of all the monies which should be made or produced by the sale of the coal and culm to be raised from the premises. And in case the lessee, his executors, or administrators should not raise, in the first year, so much coal and culm that one-sixth part thereof would amount to 25*l.*, in the second year to 50*l.*, and in the third and all subsequent years during the term to 100*l.*, then paying [*110] to the lessor, his heirs or assigns, in such first year 25*l.*, in the second year 50*l.*, and third and all subsequent years 100*l.*; and it was provided that the account should be taken at the end of every third year after Michaelmas, 1809, and the surplus workings taken upon the average of the three years. And *George Bowser*, the elder, thereby covenanted for himself, his heirs, executors, administrators, and assigns, among other things, that he and they would duly pay the said reserved rents; and would, at the end of every six months during the term, deliver unto Sir *Hugh Owen*, his heirs or assigns, a true account of all the coal and culm raised from the premises during the preceding six months, and of the monies produced thereby; and that Sir *Hugh Owen*, his heirs and assigns, should have liberty to inspect the books, and to appoint an accountant or bankman to render such account; and that *George Bowser*, the elder, his executors and administrators, should not nor would, during the same term, demise, assign, or set over or let the said mines, veins, or seams of coal, or any of them, or any part thereof, or the liberties thereby granted, or any of them, without the license or consent in writing of Sir *Hugh Owen*, his heirs or as-

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signs. And it was thereby provided, that if *George Bowser*, the elder, his executors, administrators, and assigns, should not well and truly pay or cause to be paid unto *Sir Hugh Owen*, his heirs or assigns, the said reserved rents within fourteen days next after the same should become due, being lawfully demanded; or if *George Bowser*, the elder, his executors, administrators, or assigns, should make default in performing, fulfilling, and keeping all or any of the covenants, provisoes, and agreements thereinbefore contained, which on his and their part were or ought to be performed, fulfilled, and kept; or if *George Bowser*, the elder, his executors or administrators, should become insolvent, or the term thereby granted [*111] ed, or any part thereof, should be sold or assigned to any person or persons under a writ of execution of any judgment or judgments against him or them, that then and thenceforth, and in every or any of the said cases, it should be lawful to and for *Sir Hugh Owen*, his heirs and assigns, into and upon the said premises, or any part thereof in the name of the whole, to re-enter, and the same to have again, repossess and enjoy, as in his or their first and former estate; and the said *George Bowser*, the elder, his executors and administrators, and all other occupiers and possessors thereof, from thence to expel and amove; and that the lease as to the term thereby granted, should, in that case, be forfeited; and the same term should cease, determine, and be utterly null and void, as if the same had never been made; but the covenants and agreements entered into by *George Bowser*, the elder, for himself, his executors and administrators, should continue and be in force against him and them, until he or they should have fully performed and fulfilled the same to the time of such forfeiture.

George Bowser, the elder, entered into possession, under the lease. *Sir Hugh Owen* died in 1809, having devised the mines and premises to *John Colby*, the elder, his heirs and assigns. *John Colby*, the elder devised the same premises to the Defendants, *Cordelia Maria Colby*, *Thomas Frederick Colby*, and *Charles Matthias*, upon certain trusts, and ultimately to the use of his eldest son, *Hugh Owen Colby* and his heirs. *Hugh Owen Colby* afterwards

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died under twenty-one, leaving the Defendant, *John Colby*, his brother and heir at law.

George Bowser, the elder, died on the 29th of March, 1835, having, by his will, appointed the Plaintiffs, *Mary Ann Bowser*, his widow, and *George Bowser*, his son, and the Defendant, *Abraham Meredith*, his executrix and *executors, and [*112] leaving also two other sons, *Samuel Bowser*, and *Robert Bowser*, surviving. The will was proved in May, 1835, by *Abraham Meredith* alone; and *George Bowser* and *Samuel Bowser* entered into possession of the mines, as mortgagees.

In October, 1835, the Defendants, *C. M. Colby*, and her co-trustees, brought an action of covenant against *Meredith*, to recover the arrears of rent of the premises due from the estate of *George Bowser*, the elder; to which action *Meredith* pleaded *plene administravit*. They also, in Michaelmas Term, 1835, brought an action of ejectment against the Plaintiff, *George Bowser*, and *Samuel Bowser*, to recover possession of the mines; and the said *George Bowser*, and *Samuel Bowser*, not appearing to defend the action, judgment by default was signed against the casual ejector on the 18th, of February, 1836, as of the preceding Hilary Term. The Defendant, *John Colby*, came of age in February, 1837. In Michaelmas Term, 1837, a writ of *scire facias* was issued, and the same was served on *George Bowser* and *Samuel Bowser*, on the 10th of November 1837. The judgment was afterwards revived, for want of appearance to the *scire facias*, and the writ of possession was issued and executed, and possession delivered to the Defendant, *John Colby*, on the 23rd of December, 1837.

The bill was filed the 12th of June, 1838, by *Mary Ann Bowser*, and *George Bowser*, as personal representatives of *George Bowser*, the elder; and stated, that *George Bowser*, the elder, expended large sums of money in working the colliery, and in bringing the coals to market, and paid 2,190*l.* for the sleeping rent, though the value of one-sixth of the coals worked during that time amounted

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[*113] to less than 1,200*l.*; that, upon the *death of *George Bowser*, the elder, the Plaintiffs, *George Bowser* and *Samuel Bowser*, entered into possession of the mines, and premises, for the purpose of satisfying monies which had been advanced to *George Bowser*, the elder, in his lifetime, out of the property settled on his wife, to enable him to pay rent, the working of the mines being conducted by *Samuel Bowser* alone. The bill alleged, that the agents of the Defendants had, in some communication with *Samuel Bowser* on behalf of himself and the Plaintiff, *George Bowser*, agreed to accept the arrears of rent, and give up the premises to the Plaintiffs, if they should place themselves in a position to take them, by proving the will of *George Bowser*, the elder; and that, in January, 1828, the Plaintiffs proved the will, and tendered the amount of the arrears of rent to the Defendants, which was refused: it also stated, that the Defendant, *Meredith*, refused to join in the suit. The bill prayed an account of what was due to the Defendants in respect of the premises, and the other matters therein mentioned, and of the sums which had been received by them in respect thereof, and of the profits of the mines since the 23rd of December, 1837, the Plaintiffs offering to pay what might be due to the Defendants, and that the Defendants might be decreed to deliver up possession of the mines and premises to the Plaintiffs.

The Defendants, *John Colby*, and the trustees, by their answer, admitted the demise of 1807, and said they believed that a counterpart of the lease was in the power of the Plaintiffs, and in the possession of Mr. *Barker*, a solicitor, with whom it was deposited by *George Bowser*, the elder, and that *Barker* claimed a charge, or

lien thereon, by virtue of such deposit. They said, that [*114] *George Bowser*, the elder, or persons claiming *under him, kept possession of the mines and premises from 1812 to 1825, without paying any rent; and that ejectment having been brought by the trustees, in Easter Term, 1825, *George Bowser*, the elder, and his son, when the trial was coming on, gave their cognovit, which was accepted by the trustees, to secure the payment of 1300*l.*, in three instalments, being the arrears of the sleeping-rent for

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thirteen years: that, after that time, the rent was not regularly paid; that 20*l.* only had been paid for the year 1831, and since that time nothing had been paid on account of the rent. The Defendants said, that, in March, 1835, the sum of 380*l.* was due for arrears of the rent, and that *George Bowser*, the elder, was, in fact, then insolvent: that, after the death of *George Bowser*, the elder, in an answer put in by *Meredith* to a bill of revivor and supplement filed against him in a suit of *Pitt v. Bonner*, which had been instituted against *George Bowser*, the elder, in his lifetime, *Meredith* stated, that he believed that the personal estate and effects of *George Bowser*, the elder, would not be sufficient, or nearly sufficient, for the payment of his debts; and that *Meredith*, upon proving the will and codicil of *George Bowser*, the elder, had sworn that his personal estate was under the value of 100*l.* They said, that the action of ejectment, in Michaelmas Term, 1835, was brought under the proviso for re-entry in the said lease, and they were advised to avail themselves of the statute enabling landlords to recover possession of demised premises, without demanding the rent, where it is more than half-a-year in arrear, and there is no sufficient distress on the premises (a): that no entrance to the mines could be found, except upon lands not belonging to the Defendants: that *George Bowser*, and *Samuel Bowser*, after and notwithstanding the judgment, kept possession of the mines, and "worked [*115] them more actively than before, without offering to pay any rent; and that, in the summer of 1837, after the Defendant, *John Colby*, came of age, he, for the first time, discovered a shaft, by means of which the writ of possession was subsequently executed.

The Defendants alleged that the lease had been forfeited, not only for non-payment of rent, but by breaches of other covenants: that *George Bowser*, the elder, did not make regular returns or deliver regular accounts of the coal and culm obtained from the colliery, or of the monies produced thereby; and that the returns before 1815, and from 1825 to 1830, were entirely wanting: that by indenture

(a) 4 Geo. 2, c. 28.

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of the 11th of August, 1812, *George Bowser*, the elder, assigned a moiety of the mines to *Thomas Farquharson* for the residue of the term; and that after some mesne assignments, the said moiety was, on the 2nd of December, 1816, assigned to *George Bowser*, the elder, in trust for *T. Foster*, *C. Bonner*, and *T. Gaunt*; that *George Bowser*, the elder, by agreement in writing, had contracted to sell to *Gaunt* and another, one-fourth share of the mines; that *Foster*, *Bonner*, and *Gaunt*, charged their three-fourth parts with annuity to *Pitt*, and that the annuity and charge had been established by the decree in a suit of *Pitt v. Bonner*. They stated that neither *Sir Hugh Owen*, or any person claiming under him, had given any license for such assignment.

The Defendant also said, that about the month of February, 1836, *Samuel Bowser* had several interviews with the Defendant's solicitor, and that the object of *Samuel Bowser* appeared to be, to get rid of the lease of 1807, and obtain a new lease of the premises to himself and the Plaintiff, *George Bowser*, exclusively; that at the request of the Defendants' solicitor, the proposal was [*116] made in writing to him by the solicitor of *Samuel Bowser*, and was submitted to the trustees; that in May or June, 1836, *Samuel Bowser* had also an interview with one of the trustees; and was finally informed that the trustees had not power to grant a new lease; that they declined to fetter the then infant *John Colby* with any promise or engagement to grant a new lease, and that the business must take its course.

The Defendants examined witnesses, some of whom deposed to their belief of the embarrassed circumstances and insolvency of *George Bowser*, the elder, in his lifetime. They also proved, as exhibits, several accounts of coals rendered by the lessees, (some of them embracing in one account periods of several years), the answer of *Meredith* in the suit of *Pitt v. Bonner*, and the decree in the same suit, declaring *Pitt* entitled to have three-fourths of the colliery and premises sold, subject to the provisos contained in the lease. They also proved the following documents:—

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A memorandum dated the 13th of November, 1811, by which, reciting an agreement of the 13th September, 1811, *William Cole* agreed to pay *George Bowser*, the elder, 2000*l.* for a moiety of his interest in the colliery, and directing the mode of payment; and they agreed that the rents and all expenses of the concern should be paid by them equally, and all sums received on account of the concern equally divided between them.

A memorandum of agreement dated the 11th of August, 1812, whereby, reciting the said agreement of the 13th of September 1811, *George Bowser* agreed that the moiety of the colliery, which was to have been possessed by *William Cole*, should be enjoyed by *Thomas Farquharson*, who should possess [*117] and enjoy two-thirds of the colliery.

A memorandum of agreement dated the 17th of February, 1813 whereby, after reciting that *George Bowser* and *Thomas Farquharson* were jointly interested in and solely possessed of the colliery, it was agreed that, for better working the same, such working should be carried on by *George Bowser*, the younger, subject to the entire control of *Farquharson*; and that the coal worked should be delivered to *Farquharson* to be sold in his own name, and on his own private and separate account, paying to *George Bowser*, the younger, weekly, the expenses of working and finishing the level, and a certain salary; and also the reserved rent of one sixth of the value of the coal payable to the lessor; and paying also a certain annuity to the Plaintiff, *Mary Ann Bowser*, or her trustee; and it was provided that *Farquharson*, by giving notice, might put an end to the agreement, and revert to his antecedent agreements; and that this instrument was to be considered as the heads and preparatory arrangements for proper deeds to carry into effect the original agreement.

An agreement dated the 7th of September, 1813, whereby *George Bowser*, the elder, agreed to convey and assign to *John Bowser*, *George Bowser*, the younger, and *Samuel Bowser*, as trustees for the Plaintiff, *Mary Ann Bowser*, all his right in a certain

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estate therein mentioned ; and he also declared that the colliery was in the possession of the same trustees, and that the same and the profits thereof were to be applied in the first place to pay the Plaintiff, *Mary Ann Bowser*, or her said trustees, all the money advanced by them for opening the colliery, and the sums paid by them to Sir *Hugh Owen* and Messrs. *Colby* for rent ; and that the [*118] said trustees were then in possession of the said estate and colliery as mortgagees for the principal and interest due to them in respect thereof.

A deed of composition dated the 25th of July, 1833, whereby certain scheduled creditors of *George Bowser* agreed to accept payment of their respective debts by three instalments in three successive years.

A memorandum dated the 18th of June, 1834, signed by *George Bowser*, *Mary Ann Bowser*, *George Bowser*, the younger, and *Mary Bowser*, whereby *George Bowser*, agreed to sell to *Robert Bowser* as much coal as the said *Robert Bowser* could work and bring out of the east part of the colliery level, at 18s. the wey, of five waggons ; and *Robert Bowser* engaged to work the same coal for *George Bowser* at 8s. the wey, beyond every expense except the land money or royalty payable to the executors of the late *John Colby* so as the price to be paid by the said *Robert Bowser* to the said *George Bowser*, his executors and administrators, should be clear 10s. a wey, or 2s. for every waggon of coal worked or brought from the east part of the colliery ; and in default of payment, or any matter preventing the regular working by *Robert Bowser* for *George Bowser*, then *Robert Bowser* engaged to give up such working. And by the same agreement, after reciting that the part of the property settled on the Plaintiff, *Mary Ann Bowser*, before her marriage, had been advanced by her trustees, *George Bowser*, the younger, and *Samuel Bowser*, for paying arrears of rent for the colliery to the lessor, it was agreed by *George Bowser*, the younger, on behalf of himself and the other trustees, that *Robert Bowser* should have quiet and undisturbed working of the coals from the

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east part of the level, he purchasing the same and paying one moiety of the said price of 1s. per waggon into the hands of *the Plaintiff, *Mary Ann Bowser*, or of her said trustee [*119] for her separate use, according to her marriage settlement, and another moiety to *George Bowser*, his executors, administrators, and assigns.

The Defendants, at the hearing, called the attesting witness, and proved, in the usual manner, viva voce, an indenture made the 4th of March, 1833, between *George Bowser*, of the first part, *J. Freeman*, of the second part, and *G. Barker*, of the third part, whereby *George Bowser* conveyed and assigned the colliery and other lands and premises to *Freeman*, his executors, administrators, and assigns, by way of mortgage to secure the sum of 1500*l.*, and interest, due to *Freeman*, and the sum of 361*l.* due to *Barker*. This deed was in the custody of *Barker*, by whom it was produced.

Mr. *Sharpe* and Mr. *Chandless*, for the Plaintiffs.

The relief is sought upon the ancient principle of equity, which is anterior to, and wholly independent of, the statute (a). The principle is stated in *Cary* (b), "where lands are granted in reversion, and the grantor will avoid the lease for a rent, paid, but not on the day, the Court will relieve." And in *Descarlett v. Dennett* (c), relief, in such cases, is stated to be a settled rule. *Taylor v. Knight* (d). The statute only restricts the exercise of the jurisdiction, which was previously indefinite in point of time, to cases where the bill is filed within six months. The intention of the statute is so stated by Lord *Mansfield* (e), Lord *Eldon* (f), and Baron *Wood* (g).

*The principle is the same as that upon which relief is [*120] given to the mortgagor, when the estate of the mortgagee

(a) 4 Geo. 2, c. 28.

(b) P. 45.

(c) 9 Mod. 22.

(d) 4 Vin. Ab. Chanc. (Y.) pl. 31, p. 406.

(e) *Doe v. Lewis* 1 Burr. 619.(f) *Hill v. Barclay*, 18 Ves. 60.(g) *Doe v. Smith* 7 Fric. 326

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is become absolute at law. The proviso for re-entry is regarded as, in fact it is, a mere form of security to the landlord, for that which he has reserved to himself by the lease, and not as an independent limitation. *Story's Equity Jurisdiction* (a). The Court accordingly treats it as a security. *Davis v. West* (b); *Hill v. Barclay* (c); *Lovat v. Lord Ranelagh* (d); *Wadman v. Calcraft* (e).

The only question then is, whether there has been any breach of covenant against which the Court would not relieve. The assignments, alleged to have been made without license, are all equitable, and are not, therefore, breaches of covenant; *Doe v. Bevan* (f); *Doe v. Hogg* (g); or they amount to nothing more than a mere parting with possession, *Doe v. Payne* (h), or, relate only to a particular mode of working the mine. The alleged irregularity in the delivery of the accounts does not appear to have been objected to on the part of the lessor,—for it must have been known to him, and has been repeatedly waived. *Roe v. Harrison* (i); *Goodright v. Davids* (k). The insolvency is not alleged in the answer as a breach; but if it were so alleged, the term must not be construed in its popular sense, but in its legal sense. The insolvency contemplated by the lease, is that which occurs where the party takes the benefit of the act for the relief of insolvent debtors, whereby his interest is transferred to his assignees. *In re Birmingham Benefit Society* (l).

[*121] "The Plaintiffs would, however, have been entitled to an issue at law, to try the existence of any alleged breaches of covenant, if the Defendants had properly raised that case.

Mr. *Temple* and Mr. *Walker* for the Defendants, *John Colby* and the trustees.

The effect of the statute is to render it imperative upon a tenant

(a) Vol. 1, p. 506.

(d) 3 Ves. & B. 24, 30.

(g) 1 Car. & Pay. 160.

(k) 2 Cowp. 303.

(b) 12 Ves. 475.

(e) 10 Ves. 67.

(h) 1 Stark. 86.

(l) 3 Sim. 421.

(c) 18 Ves. 56.

(f) 3 Ma. & Sel. 353.

(i) 2 T. R. 425.

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seeking relief against a forfeiture, to pay the rent and costs into Court, and the Plaintiffs having omitted to do this, are precluded from relief. *O'Mahony v. Dickson* (a). The ejectment against the effect of which the bill is brought to be relieved, was not an action brought against the present Plaintiffs, but against the Plaintiff, *George Bowser*, and another person, who is not a party to this record. The Court has not jurisdiction to do that which is required by this suit; inasmuch as the Defendants have not a mere power of re-entry, on non-payment of rent, but the contract which the Plaintiffs' testator entered into with them is, that the lease shall absolutely cease and be void. That being the case, there is no longer any subject with which the Court can deal, or which can be restored. Once become void, the lease cannot be again set up. *Finch v. Throckmorton* (b); *Mulcarry v. Eyres* (c); *Doe v. Banckes* (d). Before it can be said that the Defendants have waived any breach of covenant, it must be shewn that they had notice of the breach at the time they did the act which constitutes the alleged waiver; but here there is no such notice shewn, and the Court will not infer a waiver. *Roe v. Harrison*. It is not necessary to shew that the lessee was technically an insolvent debtor, *Bayly v.*

Schofield (e); *Biddlecomb v. Bond* (f), if there be [*122] proof of insolvency in the ordinary sense of the word.

The ejectment was brought, not only under the power of re-entry for non-payment of rent, but for other breaches of covenant. In suffering judgment by default, the Defendants in the action prevented the causes of action from being assigned or tried. The lessor ought not to be forced to a second trial, at the expiration of an interval of many years, to determine the existence of those causes of action which he has already twice given the lessees an opportunity of trying. The suit, moreover, is not instituted by the acting executor, but by others who have proved the will, merely for the purpose of prosecuting it. The Court will look at the agreements which are assignments in equity; and in the consideration of a claim,

(a) 2 Sch. & Lef. 400, 412.

(b) Cro. Eliz. 221.

(c) Cro. Chas. 511.

(d) 3 B. & Adol. 401.

(e) 1 Ma. & Sel. 338.

(f) 4 Adol. & Ell. 332.

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which, at most, is merely equitable, will regard them as having the same effect on that claim, as a legal assignment would have upon a legal title. The lessee has, in fact, actually parted with the possession, which is a breach of covenant. *Roe v. Sales* (a). The conduct of the lessee, and those claiming under him, in acting directly contrary to the covenants of the lease,—in constantly suffering the rent to be in arrear,—in the irregularity of the accounts,—in setting the judgment at defiance, and holding the mines, until the shaft was discovered by means of which the execution was executed,—altogether constitute such a course of dealing with the property as will, in the view of a court of equity, deprive them of any title to that relief which is purely matter of indulgence.

There is, however, a clear legal assignment shewn to [*123] *have been made by the deed of the 4th of March, 1833, and which deed is now proved. *Hind's Pr.* (b), *Fowler, Pr. in Exch.* (c), *Ward v. Eyles* (d). Unless, therefore, it can be argued, that an assignment by way of mortgage is not a breach of covenant, the question is concluded.

Mr. *Sharpe*, in reply.

It is within the jurisdiction of the Court to relieve, not less where the provision declares that the lease shall be void, than where there is a mere power of re-entry. The form of the order which was made in the old cases before the statute, assumed that the lease was void, and directed the Defendants to make a new lease for the residue of the term; *Taylor v. Knight*; and the statute has given even greater efficacy to the decree in equity, by providing that upon relief in equity, no new lease shall be necessary (e).

The clause of the statute with reference to paying the rent into Court, only applies where the landlord is restrained from recovering possession. There is no case in which the rent has been paid into Court, where the landlord is in possession. It is plain, from the

(a) 1 Ma. & Sel. 297.
(d) Mos. 261.

(b) P. 270.
(e) Sect. 4.

(c) R. 127.

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course the cause of *Wadman v. Calcraft* took, that the rent had not been paid into Court. *O'Mahony v. Dickson* is a case upon the construction of an Irish statute differently expressed, and has no application. There is no authority for the proposition that the creation of an equitable interest is to have the same effect as a legal assignment.

The alleged deed of March, 1833, is not before the Court, for the purpose for which it is sought to be "used. [*124] It is not stated or referred to in the answer, which would be sufficient to exclude it from being acted upon as against the Plaintiffs. But it is not proved in the cause: the witness who has been called can do no more *viva voce* than prove his hand-writing. *Earl Pomfret v. Lord Windsor* (a), *Lake v. Skinner* (b), *Barfield v. Kelly* (c). The only evidence relating to the deed, therefore, is, that the witness signed his name to that instrument as the attesting witness thereto. That is not evidence which can prove the deed against the Plaintiffs: the alleged execution of the instrument by the lessee is matter of cross examination, if it were pleaded and given in evidence in the usual way.

VICE-CHANCELLOR:—

The arguments in this case have been directed to some points, with regard to which I feel no difficulty. Other questions have been raised, which I shall not at present dispose of.

Some observations were made on the circumstance, that this bill is filed by two out of three of the executors of the lessee of the mine in question, and that one of the executors, Mr. *Meredith*, disapproved of the proceedings; and this was adverted to, either as constituting an objection to the suit, or as a fact from which I was to draw some inference unfavourable to the merits of the claim put

(a) 2 Ves. 472.

(b) 1 J. & W. 15.

(c) 4 Russ. 355

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forward by the bill. It is plain, that no weight can be attributed to such arguments. If the reasons, which have prevailed [*125] with Mr. *Meredith*, in leading him to refuse his assent to, or, at least, his authority and joint responsibility for this suit, have proceeded upon the absence of equitable grounds for the relief of which is sought, the Court must regard them, whether they did or not enter into his consideration, in refusing to join in the suit: if he had motives of any other kind for declining to become a Plaintiff in the cause, such other motives the Court is not at liberty to regard.

It has, in the first place, been objected, that the statute 4 Geo. 2, c. 28, precludes relief, because the Plaintiffs have not, within forty days after the answer was put in, paid the arrears of rent into Court. It becomes, therefore, necessary to see whether the Plaintiffs were bound to pay into Court the arrears of the rent in that stage of the cause, on pain of having their bill dismissed at the hearing.

Where the rent is half-a-year in arrear, and the lessor has a power of re-entry, the second section of the statute dispenses with several things which the law previously required, and enables the lessor to recover possession in a more summary way. Before this statute was passed, the tenant might, at an indefinite time after he was ejected, have filed his bill and been relieved against the effect of the mere non-payment of rent; but the second clause in this section enacts, that if the lessee suffers judgment to be had, and execution to be executed, without paying the rent and costs, and without filing any bill in equity within six months after such execution, he shall be absolutely barred from all relief in law or equity other than by writ of error. The tenant, in this case, has taken himself out of the operation of this clause, by filing his bill within the six months.

[*126] It is obvious that there were two distinct cases which might occur before the statute;—first, where the lessor having brought his ejectment, the tenant, before judgment or before

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execution, filed his bill for relief, and obtained an injunction to restrain the lessor from turning him out of possession. In that case, the tenant being enabled to continue in possession, and remaining in the mean time a debtor to the landlord for the amount of the rent, the latter, until the hearing of the cause, would have no security for his rent, unless the amount due were paid into Court; secondly, there was the case where the lessor actually recovered possession in the ejectment; and the only relief which the tenant could have, was such as the Court might give him at the hearing. I do not now express any opinion with regard to the terms which the Court may impose upon the tenant, if it makes a decree in his favour: I direct my attention only to the objection, that the tenant ought to have paid the rent into Court within forty days after answer. The words of the third section, on this subject, are—"That in case the lessee shall, within the time aforesaid, file one or more bill or bills, for relief in any court of equity, such person or persons shall not *have or continue any injunction* against the proceedings at law on such ejectment, unless he, she, or they, do or shall, within forty days next after a full and perfect answer shall be filed by the lessor or lessors of the Plaintiff in such ejectment, bring into Court, and lodge with the proper officer, such sum and sums of money as the lessor or lessors of the Plaintiff in the said ejectment shall, in his, her, or their answer swear to be due and in arrear, over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the Court." This provision clearly applies to the case "where the tenant comes for an injunction by which his possession is to be continued, and [*127] the landlord restrained from proceeding with his ejectment. In all those cases, if the injunction is granted, the Court is bound by the statute to impose these particular terms for the security of the landlord. But if the landlord is actually in possession, undisturbed by the interposition of the Court, and the first application which the tenant makes to the Court for any relief is made at the hearing of the cause, the statute does not then apply. The hearing of the cause is the first occasion upon which the Court acquires jurisdiction

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over the Plaintiff in the subject of the suit; and the exercise of that jurisdiction must be governed by the general rule of the Court. The words of the statute cannot be extended to the case where no injunction is asked or obtained, and where the only relief given is given at the hearing of the cause.

It was said that Lord *Redesdale* in *O'Mahony v. Dixon* (a), had, in effect, decided to the contrary of what I have stated to be my opinion:—not that he had so decided upon the act of the 4th of Geo. II., which regulates property in this country; but upon a somewhat analogous act of the Irish Parliament, of the 4th of Geo. I. (b). If the Irish act had been in the same terms as the English act, and Lord *Redesdale* had put a judicial construction on the former, I should, of course, in deference to his judgment, have hesitated before I gave a contrary opinion on the latter; but when the Irish act is referred to, it appears that the language of it materially differs. There is in the Irish act a proviso, making it imperative on the lessee who has suffered judgment to be recovered in ejectment, and execution to be levied, not “only [*128] to file his bill within six months, but, “on filing” his bill, to bring both the amount of the rent and of the taxed costs into Court: and this is the construction which Lord *Redesdale* has put upon the act.

I am clearly of opinion that the Plaintiffs have not lost any right to relief, by not having paid the rent into Court.

The next point taken was, that there are two different species of previsoos in leases; in some, a common clause of re-entry on non-payment of rent, thereby determining the lease, and nothing more; in others, a proviso declaring that if the rent is not paid, the lease shall be void; and there being in this case a proviso “that the lease shall become absolutely void,” it is said that there is now nothing for the Court to act upon—no lease existing which it can restore to the tenant, and therefore, that the Court will not interfere.

If it could have been shewn that a court of equity gave relief only

(a) 2 Sch. & Lef. 400.

(b) Chap. 5.

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before the landlord had entered, the argument might have been well founded, but inasmuch as in most of the cases relief has been given upon bills filed after the landlord has entered, the argument must be fallacious; for when the landlord has entered, the lease is equally at an end in a court of law, whether there is a proviso for re-entry simply, or a proviso that it is to be void on non-payment of rent. It is said, however, that the contract of the parties is different—that where it is declared that the lease shall become absolutely void on non-payment of the rent, the true construction is, that the parties mean the lease shall in fact be at an end, and no relief shall be given against that consequence of the non-payment of rent. I can by no means accede to this construction. [129] The legal effect in one case is, that, if the landlord re-enters, the lease is determined,—in the other case, it is determined without his re-entry. The contract of the parties is, that, in one case, the lease shall not be at an end by the mere non-payment of rent, unless the landlord shall re-enter, and then that it shall be at an end; and, in the other case, that the non-payment of rent alone shall determine the lease. In both cases the same consequence is to follow, though from different acts. In both the contract is the same, in this sense, that there are certain acts to take place which are to determine the lease altogether.

The indenture of demise in this case, after the covenants for payment of rent,—rendering the accounts,—and against the demise or assignment of the premises, provides, that if the lessee should not pay the reserved rents within a given time, or should make default in the performance of the other covenants on his part, or should become insolvent, or the term should be taken in execution, then it shall be lawful for the lessor to re-enter upon and repossess the premises as in his former estate, and to expel the lessee (a). If the proviso had ended here, it would have been no more than the common power of re-entry in the case of a breach of covenant; and, if the landlord entered under this power, the legal consequence would follow, that the lease would become to all intents and purposes for-

(a) *Ante*, p. 111.

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feited, and the term would be void. The remainder of the proviso,—that “the lease as to the term hereby granted shall in that case be forfeited, and the same term shall cease and determine and be utterly null and void, as if the same had never been [*180] made and created,” expresses nothing more *than what the law itself would imply, if those words had not been found there.

It appears from the case of *Taylor v. Knight*, and from Lord Eldon’s observations in *Hill v. Barclay*, that the Court formerly used to consider (the lease being gone at law by the re-entry), that the only way it could give relief was by creating a new lease, until the statute, recognising the right of the tenant to be relieved, dispensed with that form of relief, and declared that the last lease should be deemed to have continuance. The analogy to the case of mortgages fortifies the same reasoning. The object of the proviso in both cases is to secure to the landlord the payment of his rent; and the principle of the Court is,—whether right or wrong is not the question,—that, if the landlord has his rent paid him at any time, it is as beneficial to him as if it were paid upon the prescribed day.

It is not, however, necessary that I should pronounce any opinion upon the case of a lease being absolutely void, for, in this case, I think it was voidable only. The most recent case I have been able to find on the subject, is a case of *Arnsby v. Woodard (a)*. A lease had been granted, with a proviso that if the rent should be in arrear for twenty-one days after demand made, or if any of the covenants should be broken, the term thereby granted, or so much thereof as should be then unexpired, “should cease, determine, and be utterly void, and it should be lawful to and for” the landlord “upon the demised premises wholly to re-enter, and the same to hold to his own use, and to expel” the lessee. There the declaration that the lease shall be void by the non-payment, pre- [*181] ceedes the power of re-entry, a *consequence of law, which, of course, attaches to the forfeiture of the lease.

(a) 6 Barn. & Cres. 519.

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In this case, the clause of re-entry comes first, and the declaration of the legal consequences follows. In that case, *Doe v. Bancks*, and another case of *Rede v. Farr* (a), were cited; and Lord *Tenterden*, holding that, notwithstanding those clear words making it void, the acceptance of subsequent rent would keep the lease alive, said, that taking the two clauses together the sound construction of them gave to the landlord a right to re-enter, to be exercised or not at his election, otherwise the latter clause "it shall be lawful to re-enter," would have no effect. He had no difficulty except that the words which declared the lease void, preceded the common power to enter; but if he might transpose those words, and put the right to re-enter first, there would be no difficulty, because the other would be a mere legal consequence. This is a strong case, when it is considered that all the old cases went to shew that where the construction of the proviso made the lease actually void, no acceptance of rent could set up a term which had ceased by the very contract of the parties.

I do not mean to give any opinion of what, in abstract cases, would be the difference in a Court of Equity between the effect of the common power of re-entry, and a clause that the lease shall be void. It is not difficult to suggest circumstances, in which the Court might give no relief where the lease was to be void, as, for example, if the landlord sought the assistance of the Court to give effect to the forfeiture. I found myself upon the construction of the words in the proviso now before me, in which construction I am supported by the judgment of the Court of Queen's Bench in *Arnsby v. Woodward*. I consider it in effect only a clause for re- [*132] entry, and the case is therefore, in that view, one in which a Court of Equity is enabled to give relief.

I think it clear that the Defendants have a right to bring before me any breaches of covenant which may have been committed other than the non-payment of rent, and which, if committed, would have occasioned a forfeiture of the lease. Whether those breaches of covenant are to be proved in the cause, or to be tried in an issue, must,

(a) 6 Ma. & Sel. 121.

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I apprehend, depend very much on the form and the course which the pleadings have taken. The deed produced by *Barker*, and proved viva voce by the usual questions put by the Registrar to the attesting witness (a), would be considered as sufficiently proved, provided the Plaintiffs had an opportunity given them of impeaching the instrument, and had not done so. If the Defendants had, by their answer, stated this deed as a specific breach of covenant, the Court might have acted upon it. The only intimation in the answer concerning any claim by *Barker* is, that a counterpart of the lease of 1807 is "in the possession of *George Barker*, with whom it was deposited by *George Bowser*, the elder, and *George Barker* claims a charge or lien thereon by virtue of such deposit." It is impossible to say, that, upon this statement, the Plaintiffs could come prepared to meet the case upon the deed of March, 1833, proved for the first time, at the hearing.

I have no doubt that the Court is bound to take notice [*133] of the conduct of the Plaintiffs' testator in "dealing with the property comprised in the lease, in considering the question whether he would have been entitled in equity to redeem the lease, although such conduct might not of necessity involve any breach of the covenants contained in it.

There are other questions which I shall not dispose of without further consideration.

VICE CHANCELLOR:—

At the conclusion of the argument in this case I intimated my opinion upon some of the points which had been argued at the bar. First, I was of opinion with the Plaintiffs upon the construction of

(a) In the discussion as to the effect of the examination of the attesting witness viva voce, inquiry was made of the Registrar (*Mr. Colville*) of the nature of the examination which was taken. The Registrar said, that the usual questions were three:—"Is that your handwriting? Did you see A. B. sign this deed? Did you see him deliver it?"

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the statute 4 Geo. 2 (a), that the non-payment into Court of the debt, sworn by the answers to be due from him, would not alone deprive him of a right to a decree in his favour, if he were in other respects entitled to such decree. Secondly, I was of opinion with the same party, that, according to the true construction of the clause of forfeiture in the lease of 1807, the lease was voidable only, and not void, by breach of the covenants contained in it; *Arnsby v. Woodward* (b); and consequently, that the point so elaborately argued at the bar did not arise in the present case, namely, that a lease, which by its terms was to become merely void by breach of the covenant for payment of rent, could not be set up by the decree of a Court of Equity:—an argument, however, which I thought right at the time to say was founded upon a distinction I did not acknowledge for the purposes for which it was used. Thirdly, I was of opinion with the Defendants (the *Colbys*) that they were entitled, at 'the hearing of [*134] this cause, to prove any breaches of covenant by the Plaintiffs' testator, other than that for the payment of rent; and that, if breaches of such other covenants were proved, for which the Plaintiffs might have been ejected, this Court would not relieve against the breach of covenant for payment of rent. *Wadman v. Calcraft* (c), *Davis v. West* (d). And, lastly, I was of opinion (with the same parties), that they were entitled in equity to have the conduct of the Plaintiffs' testator, in dealing with the property in question, considered by the Court with reference to the question whether he was entitled to the aid of a Court of Equity in redeeming his lease, although no breach of covenant at law might be established against him.

The questions upon which I thought it right to reserve my judgment were two—first, whether the Defendants (the *Colbys*) had proved in this cause any such breaches of the covenants in the lease as would have worked a forfeiture of that lease at law, or whether they were entitled to have such question tried in an issue or ac-

(a) Cap. 28, s. 2.
(c) 10 Ves. 67.

(b) 6 B. & C. 512.
(d) 12 Ves. 476.

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tion. And, secondly, whether the acts and conduct of *George Bowser*, the elder, in dealing with the property in question, had been such as to deprive him of a right to the assistance of a Court of Equity in relieving against a forfeiture, occasioned only by a breach of his covenant to pay the rent reserved by the lease.

Upon both these questions my opinion in one respect is the same,—that, looking at the manner in which the Defendants' case is pleaded, in respect of the alleged acts of forfeiture of the lease, and looking at the imperfect information which the evidence affords me respecting the alleged breaches of covenant, and the conduct of **George Bowser*, the elder, I cannot at present consider that the Plaintiffs have had that fair opportunity of trying the questions in this cause which would justify me in at once binding their rights upon the evidence now before me. I take for my guide, upon this point, the safe and cautious course of proceeding pointed out by Sir *W. Grant* in *Jones v. Jones* (a).

The first ground (other than non-payment of rent) relied upon by the Defendants as having entitled them to eject the Plaintiffs, was the alleged neglect of *George Bowser*, the elder, to deliver accounts of the workings of the mines according to a covenant in the lease. I cannot possibly hold, upon the evidence now before me, that the lease is forfeited upon this ground. The neglect or omission of *Bowser* to deliver these accounts, must have been within the knowledge of the lessor, and the subsequent dealing of the lessor with the tenant may have amounted to a waiver of the forfeiture, occasioned by such breach of covenant. But I must not be understood as intimating any opinion upon the question, whether the covenant I am now referring to had been broken or not.

The next ground relied upon as having entitled the Defendants to enter and avoid the lease, was the alleged insolvency of *George Bowser*, the elder. In answer to this point, it was contended for the Plaintiffs, that the word "insolvent" purported an insolvency, whereby the property of the insolvent would by law be divested out

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of himself, and transferred to another. And further, that if such were not the meaning of the word in the abstract, its meaning, in that sense, was fixed by the context of words in the covenant in the lease. *The cases, as to the sense in which [*136] the word insolvent is to be construed, where the clause containing it does not itself fix the meaning, are numerous. *Reader v. Knatchbull* (a); *Bayly v. Schofield* (b); *In re Birmingham Benefit Society* (c); *Cutten v. Sanger* (d); *De Tastet v. Tavernier* (e). I abstain, however, from giving any opinion upon this point of construction, because so far as my ultimate judgment may depend upon the insolvency of *George Bowser*, the elder, I certainly consider the Plaintiffs entitled to the benefit of an issue to try that fact. Independently of other considerations, the case upon which the Defendants rely for establishing the fact of insolvency, is not so brought forward in the pleadings, that the Plaintiffs could be prepared to meet the evidence upon that point adduced by the Defendants. The subject is one upon which cross-examination might be most material; and, in this case, the Plaintiffs could not have had the benefit even of the imperfect cross-examination which the mode of taking evidence in this Court affords.

The third and only other ground (except the non-payment of rent) upon which the Defendants have relied as a ground for avoiding the lease, was a breach of the covenant in the lease, not to assign without license. The specific breaches of this covenant brought or attempted to be brought under my notice are, an assignment to one *Freeman*, in 1833, by way of mortgage; and a decree of this Court in *Pitt v. Bonner*, declaring a party in that cause entitled to an assignment of the lease or some interest in it, and decreeing the same accordingly. These, as I understand the case, are the only two cases of actual *legal assignments of the [*137] property, which the Defendants rely upon. The other cases of dealing with the property to which the pleadings and evi-

(a) 5 T. R. 218, n.

(b) 1 Ma. & Sel. 338.

(c) 3 Sim. 421.

(d) 2 Y. & Jer. 459.

(e) 1 Keen, 161; and see cases, 3 Sugd. Vend. & Pur. p. 318, ed. 10.

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dence refer, are not, as I understand the Defendants' case, represented as assignments of the property. Without going into the question, whether the evidence in support of these two alleged assignments is sufficient or not, I am clearly of opinion, that I cannot, consistently with the practice of this Court, bind the rights of the Plaintiffs, in respect of these alleged assignments, without giving them an opportunity of trying the case in an issue. How could the Plaintiffs,—unless I am to begin by assuming the Defendants' case to be true within the knowledge of the Plaintiffs—be prepared upon these pleadings to try whether the alleged assignment to *Freeman* had involved a forfeiture or not? or, if it had so done, to shew that the Defendants' right to enter and avoid the lease had been waived. Whatever view of the case I might have taken if *George Bowser*, the elder, had been living and were himself Plaintiff, I cannot, in a contest between his personal representatives and these Defendants, consider that the pleadings have given the Plaintiffs that fair notice of the specific case to be made against them at the hearing, which would justify me in now deciding the matters in dispute in this cause, so far as the decision may depend upon the alleged assignment to *Freeman*.

With respect to the decree in *Pitt v. Bonner*, I cannot, upon the information now before me, assume that such decree, even if executed, would work a forfeiture of the lease at law. That question would or might be materially affected by previous dealings with the property, to which the Defendants might not be in a condition to object. I have always understood that a Court of Equity [*138] would not decree a specific performance of an agreement, where the agreement, if performed, would work a forfeiture of interest. The opinion of Sir *W. Grant* in *Weatherall v. Geering* (a), is an authority directly in point.

The remaining question is one upon which I have felt and still feel great difficulty. I admit that a case may well exist in which a lessee shall have so dealt with the property of his landlord, or other-

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wise so acted, as to deprive himself of all right to equitable interference in redeeming his lease, forfeited by non-payment of rent, although no covenant other than that for payment of rent may have been broken. But I disclaim the proposition, that a Court of Equity is to exercise a merely arbitrary discretion upon this subject, or that the equitable considerations which should deprive the Plaintiffs in this cause, of their right to redeem their testator's lease, must not be such as are capable of being defined, or, at least, reduced to a principle (a). In the absence of authority upon this specific point, I refer to the cases which appear to me most nearly analogous to the present; namely, those cases in which the Courts have had occasion to consider, whether the acts or circumstances of a plaintiff, asking the specific performance of an agreement to grant a lease, are such as to deprive him of the aid of the Court in obtaining such lease by its decree. In the first place, I think I could not hold as an abstract proposition, that mere equitable agreements, giving charges upon the property, not accompanied with a change of the possession or other alteration in the property, would work a forfeiture of the lease in equity, if the acts, which are relied upon as having worked a forfeiture of the lease at law, can be got over by the plaintiff. *Weatherall v. Geering* (b). These agreements might "never have led to a breach in law of the covenants [*139] in the lease; and I cannot assume that a Court of Equity would have decreed a performance of agreements, the execution of which, I am told, would have avoided the lease at law, or, at least, have made it voidable. *Weatherall v. Geering*. Independently of this, in considering the acts imputed by the Defendants to the Plaintiffs, I am bound at the same time to consider, what have been the acts of the Defendants in relation to the same matters. Now I take it to be a settled principle of this Court, a principle more strictly applicable to mining property than any other, (*Norway v. Rowe* (c)), that a party who witnesses a breach of contract by another, and lies by and permits the alleged wrong-doers to proceed in the acts complained of, incurring expenses and liabilities, instead of applying promptly to this Court for relief,—I say I consider it a settled prin-

(a) See 18 Ves. 111.

(b) 12 Ves. 509.

(c) 19. Ves. 155.

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ciple, that a party so acting will be considered in this Court as having waived its special interposition, and he will be left to his legal remedies: I certainly will not be the first judge who fails to give the utmost effect to that principle in equity. [1]

Now, what has been the conduct of the Defendants in this cause, with respect to all the wrongful acts which they impute to the Plaintiffs? Their conduct, with respect to the non-delivery of accounts, according to the covenant in the lease, I have already observed upon. The alleged insolvency, according to the Defendants' evidence, was known to them in April, 1835. The alleged fact that the possession of the property had been given over to *George Bowser* and *Samuel Bowser*, as mortgagees, was known in December, 1835.

And the time or times when the several alleged agreements [*140] became known to the Defendants is nowhere brought to my notice. The Defendants allege, that an action was commenced in 1835, and judgment was signed in the action in February, 1836. In the summer of 1837, they discover that they can have access to the mines without any trespass upon the lands of others. But it is not until Michaelmas, 1837, that instructions are given by the Defendant, *John Colby*, to his solicitors to carry the judgment into effect. In the mean time the trustees of *Colby's* estate had been carrying on a treaty with *Samuel Bowser* who is not a trustee of *George Bowser's* estate, to grant a lease of the premises to him in substitution of the lease in question which belonged to *George Bowser's* estate, and, therefore, the proceedings against *Bowser's* estate were suspended. I cannot think the infancy of the Defendant, *John Colby*, until 1837, is any answer to this case of delay, seeing that *Colby's* estate was vested in trustees, who not only had power to protect his interests but were acting in relation to his affairs, and to these mines in particular. The pendency of the action, if it was not prosecuted with diligence, but suspended under the circumstances appearing in the cause, does not answer the objection, that, whilst the action has been delayed, the Plaintiffs may

[1] See *Walker & Jeffries*, Post. 341 note 1.

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have incurred expenses and come under liabilities which were essential to the beneficial enjoyment of the property.

A great deal was said in the argument concerning what was called the general conduct of *George Bowser*, the elder, throughout the transactions embraced in this suit. Upon that I must observe, that I cannot take notice of conduct except as it is brought forward in evidence before me. The specific acts, which have been so brought forward, I have already noticed. For these and other reasons, which the pleadings and evidence suggest, I think I shall best consult the justice of the case by making the [*141] result of this suit depend upon the legal right of the Defendants to enter and determine the lease at the time when judgment was recovered in the ejectment.

Upon the form of the issues to be directed, and the terms (if any) which I ought to impose upon the Plaintiffs, as to bringing into Court the amount of the sleeping rent due at the time when the Defendants recovered possession of the premises, and the costs at law, I wish to hear counsel.

Mr. Temple and *Mr. Walker* for the Defendants.

The form of the issue should be similar to that which was directed in *Thompson v. Guyon* (a).

The Plaintiffs ought not to be permitted to try the issues until they have paid the rent in arrear, the costs at law, and the costs of the suit to the hearing. The rent also, from the time the Defendants recovered possession until the present time, ought to be secured in Court, to be dealt with as the Court shall hereafter direct. *Ex parte Vaughan in the matter of Edridge* (b). The Defendants should have some security that the Plaintiffs will be able to redeem the lease. The evidence shows that the estate of *George Bowser*, the elder, is insolvent.

(a) 5 Sim. 72.

(b) T. & Russ. 434.

 1841.—*Bowser v. Colby.*

Mr. *Sharpe* and Mr. *Chandless* for the Plaintiffs.

The argument, as to paying money into Court, proceeds on a fallacy: the payment into Court is required only where the defendant is, in the mean time, restrained from prosecuting a legal right whereby he might recover the money which is so secured. This case is totally different. The Defendants are in full possession [*142] of every legal right. It is only, if the Plaintiffs succeed in this suit, that the Court has any jurisdiction to compel them to pay the arrears of rent, and, in that case, the Defendants must of course, before the lease is restored, be paid all they now ask. If, on the other hand, the Plaintiffs should fail, whether the money is in Court or not, there is no power to order that it shall be paid to the Defendants. The proposition, therefore, is, that the money must be paid in,—not to secure it,—not to give the Court any jurisdiction over it,—but solely to satisfy the Defendants that the Plaintiffs possess a certain sum of money. The proposition is altogether novel. Whether there are assets of the estate of the lessee is wholly immaterial to the Defendants, for they must be fully paid before relief can be obtained by the Plaintiffs. There is no more reason now for paying the money into Court than existed before the hearing. The issue is only to complete the evidence, which has been but partly given, and the payment into Court cannot, on any known principle, be imposed as a term upon the Plaintiffs. No money was paid into Court in *Wadman v. Calcraft*, where the issue was directed by Lord *Eldon*.

The VICE-CHANCELLOR directed two issues, to be in substance the same as the first and third issue in the case of *Thompson v. Guyon*; and, on the other point, said, that, if the rent and costs were paid into Court before the trial of the issue, it would not give the Court any power to deal with it, otherwise than by ordering it to be repaid to the Plaintiffs, in case they should fail in obtaining the decree for the restoration of the lease. The Court could not make the Plaintiffs pay their debt to the lessor, unless they obtained that which they

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came to redeem. If the Plaintiffs had a decree in their favour, it was equally clear it could only be on the terms of paying the entire debt and costs. "There was this answer to the [*143] case of insolvency of the estate of the Plaintiffs' testator, —that, if the Plaintiffs should recover the lease, they might possibly thereby recover assets.

VICE-CHANCELLOR :—

I am of opinion that, in giving the Plaintiffs an opportunity of establishing their case on an issue, I ought to impose upon them the obligation to bring into Court the amount of the rent due at the time when the writ of possession was sued out by the Defendants, and also the costs at law. I desired to have this point argued, as I entertained considerable doubt upon it at the time I gave my judgment upon the rest of the case.

The grounds upon which I doubted of the propriety of imposing these terms upon the Plaintiffs were of this nature :—

The case is not within the scope, but the very converse of the cases in which such terms are usually imposed upon a plaintiff. The ordinary cases in which such terms are imposed were noticed in the argument for the Plaintiffs ;—as for example, when the defendant in equity is proceeding against the plaintiff at law, and this Court upon equitable grounds restrains the assertion by the defendant of his legal right. That case is the converse of the present case. There the Court provides for the defendant's protection, in the event of the plaintiff failing in his suit in equity. In this case, I am requiring the Plaintiffs to pay into Court money which they will not be bound to pay unless they succeed in their suit, and which, (so far as their bill is concerned), they have only offered to pay in consideration of their obtaining from the Court a contemporaneous restitution of their lease. Upon this distinction, I certainly doubted whether I ought to impose terms upon the Plaintiffs in directing the issues [*144] in this cause ; and my decree, in that respect, I consider

 1841.—*Bowser v. Colby.*

special. But whilst I disclaim the right to exercise a merely arbitrary discretion in imposing terms, however reasonable, upon a Plaintiff in whose favour I make a decree, I am satisfied that I am right in what I have determined, in this case, to do.

The Plaintiffs in this cause, together with the Defendant, *Meredith*, represent the estate of *George Bowser*, the elder, and it is only in the character of his representatives that I know them in this suit. Their case on the bill is, "that the Plaintiffs and the Defendant *Meredith*, as the personal representative of *George Bowser*, the elder," are entitled to the relief prayed by the bill. Now the Defendants say, that *George Bowser*, the elder, was, in his lifetime and at the time of his death, insolvent within the meaning of the proviso in the lease, which, in case of the insolvency of the lessee, entitles the lessor to enter and determine the lease. The lessors complain that the existence of the present suit seriously prejudices their interest in the property in question, a statement which can scarcely be denied or doubted; and they ask me to give them security, under the circumstances of the case, that the Plaintiffs will be able to redeem the lease in the event of their being ultimately found entitled to do so. Now, although I have decided that I ought not, upon the pleadings and evidence in this cause, at once to decide against the Plaintiffs upon the point of insolvency, I cannot overlook the fact, that evidence tending strongly to prove the insolvency, on which the Defendants rely, has been given on the part of the Defendants. The fact of such insolvency being proved, is not inconsistent with the Plaintiffs succeeding on the trial of the issues. That consideration has greatly influenced my judgment in this case.

[*145] *Upon payment into the Bank by the Plaintiffs on or before the 28th of January, 1842, to be there placed to the credit of this cause, subject to the further order of this Court, of the sum of 700*l.*, let the parties proceed to a trial at law, by a special jury at the next assizes for the county of Carmarthen, on the following issues:—*vis.* First, whether *George Bowser*, the elder, his

1841.—*Hawkins v. Dod.*

executors or administrators, or any of them, had or had not, at any time, made default in performing, fulfilling, and keeping any and which of the covenants, provisoes, or agreements contained in the indenture of lease bearing date the 19th of September, 1807, in &c., on his and their part to be observed and performed, other than in respect of the non-payment of the rent or rents thereby reserved, or had or had not become insolvent within the meaning of the same indenture: Secondly, which the lessor, Sir *Hugh Owen*, deceased, his heirs or assigns, or any of them, had done any act to disentitle himself or themselves from taking advantage of such default or insolvency. [Defendants, except *Meredith*, to be Plaintiffs at law. Plaintiffs and *Meredith* to be Defendants at law. Production of books, &c. Admission of title as executors of lessee and devisees of lessor, and of pedigree of Defendant, *J. Colby*. Reserving further direction.] And in case the jury on such trial shall find any special matter, let the same be indorsed on the postea. But in case the Plaintiffs should not pay into the Bank, as hereinbefore directed, the said sum of 700*l.* by the time hereinbefore directed, the Plaintiffs' bill is to be dismissed out of this Court with costs, to be taxed, &c.

HAWKINS v. DOD.

[146]

8 December.

Where the sum to be paid out of Court amounts to £11, it will not be ordered to be paid to the solicitor.

A SUM of 11*l.* had been reported to be due to a legatee in respect of his legacy.

Mr. *J. F. Hall* asked for an order that it might be paid to the solicitor of the legatee, to save the expense of a power of attorney. 10*l.* was commonly directed to be paid to the solicitor. *Brandling v. Humble* (a).

(a) Jac. 48.

 1841.—*Balls v. Strutt*.

The VICE-CHANCELLOR said he found the rule of the Court established, as to the amount to be paid to the solicitor, and he did not think he ought to extend it.

BALLS v. STRUTT.

10th and 11th December.

A trustee will be restrained by this Court from using the legal powers that have been conferred upon him otherwise than for the legitimate purposes of his trust and therefore a demurrer for want of equity cannot be sustained to a bill seeking such relief, although the plaintiff may have a remedy at law.

The assignee of an insolvent debtor is a necessary party to a bill by the insolvent, praying that an instrument which belonged to him, prior to his insolvency, may be delivered up to him, and an injunction to restrain proceedings upon it.

THE bill stated, that the Plaintiff, in 1836, drew a bill of exchange at three months' date, for 70*l.*, upon *Lyon*, and that *Lyon* accepted the bill; that, in February, 1840, the bill remaining unpaid, the Plaintiff indorsed it to the Defendant *Lindus* without consideration, solely to enable *Lindus* to recover the amount from *Lyon* for the Plaintiff's use; that *Lindus* indorsed and delivered the bill without consideration to the Defendant *Strutt* for the same purpose; that, on the 23d of October, 1840, the Plaintiff, being then an insolvent debtor in the Fleet Prison, filed his petition under the Act 1 & 2 Vict. c. 110, and that *Strutt* and his partners, the Defendants, *Galsworthy*, and one *Williams*, were then creditors of the Plaintiff for a balance of about 10*l.*; that the Plaintiff, in his schedule, stated the circumstances under which *Lindus* had the said bill of exchange, and that he believed, that *Williams*, *Strutt*, and *Galsworthy*, held a bill of exchange, the amount and particulars of which he did not know, meaning the bill in question; that in January, 1841, the Plaintiff was discharged under the Act for the Relief of Insolvent Debtors, and was declared entitled to the benefit of the act as to the debts specified in the schedule.

1841.—*Balls v. Strutt.*

The bill then stated, that *Strutt*, as indorsee and holder of the bill of exchange, had lately commenced an action against the Plaintiff, the drawer and indorser thereof, for the recovery of the 70*l.*; and that the Defendant *Galsworthy* was the attorney for *Strutt* in the said action.

The bill prayed that *Strutt* might be decreed to deliver up, and *Galsworthy* and *Lindus* to procure to be delivered up to the Plaintiff, the said bill of exchange, and that *Strutt* and *Galsworthy* might be restrained from proceeding with the action; and that all the three Defendants might be restrained from negotiating the bill or commencing any other action upon the same.

Strutt demurred, and assigned for cause, the want of any equity stated on the bill.

Mr. *Welford*, for the Plaintiff.

Mr. *Bilton*, in support of the demurrer, also assigned "for ground of demurrer, *ore tenus*, that the assignees of ['148] the Plaintiff under his insolvency ought to be parties to the bill.

VICE-CHANCELLOR :—

The Defendant, in this case, has filed a general demurrer; and the question, upon argument of that demurrer, is, not whether the Plaintiff is entitled to all the relief he prays, but whether, if the cause were now at the hearing, and the case stated in the bill were admitted by the answer, or proved by witnesses, any relief would under those circumstances be given. If any relief would be given, the demurrer must be overruled.

The Plaintiff, according to the statements in the bill, is the drawer of a bill of exchange for 70*l.*, of which one *Lyon* is the acceptor.

1841.—*Balls v. Strutt*.

The Defendant *Strutt*, who has demurred, is the indorser of that bill. Payment of the bill when at maturity was not made by the acceptor; and *Strutt*, the indorser, has commenced an action upon the bill against the Plaintiff, which action it is the object of this bill, amongst other things, to restrain by injunction.

The equity stated in the bill is, that the Plaintiff indorsed the bill of exchange to one *Lindus* without consideration, in order that *Lindus* might recover upon the bill against *Lyon*, the acceptor, for the Plaintiff's use, and that *Lindus* had, in like manner, indorsed the bill to *Strutt* without consideration, for the same purpose. According to the statements in the bill, therefore, *Strutt* is a trustee of the bill for the Plaintiff, and, upon this state of the case alone, it cannot be disputed that the Plaintiff would be entitled to the relief he prays by the bill.

[*149] *But it appears upon the face of the bill, in this cause, that, since the making and accepting of the bill of exchange in question, the Plaintiff has taken the benefit of the act for the relief of insolvent debtors, and the argument at the bar in support of the demurrer upon the record is founded upon this, that all the Plaintiff's interest in the bill has become transferred to his assignees; that *Strutt* is now a trustee for them, and not for the Plaintiff: and that the Plaintiff, therefore, cannot sustain any suit respecting the bill.

If *Strutt* had brought an action against *Lyon*, and not against the Plaintiff, the argument at the bar would probably have prevailed, for I should then have intended that the action was the action of the assignees. But I cannot intend that this action is the action of the assignees, for that would suppose the assignees to have brought an action against their insolvent upon a bill of which he was the drawer for value, and of which another was the acceptor. I think it more proper, upon the statements in this bill, to infer that the assignees have abandoned the bill as valueless, and that *Strutt* is availing himself of the power he gained, in his character of trustee for the Plaintiff, to commit a fraud. My observations apply only to the record

 1841.—*Blew v. Martin*.

as I find it. Of course I do not mean to impute fraud, in fact, to the Defendant.

It is a principle in this Court, that a trustee shall not be permitted to use the powers which the trust may confer upon him at law, except for the legitimate purposes of his trust; and as it is quite impossible I can do injustice in applying that principle in the present case, I think it right to apply it by not allowing the demurrer for want of equity, although the Plaintiff may have a good defence at law.

*The demurrer for want of parties must, however, be [*150] allowed. The specific relief prayed by the bill is material upon that question. The bill prays that the bill of exchange may be delivered up to the Plaintiff. The bill of exchange is *prima facie* the property of the assignees, and I cannot order their bill to be so dealt with in their absence (a).

 BLEW v. MARTIN.

1842. January 11.

It is not necessary to serve an office copy of the bill upon a party to the suit, under 23rd Order of August, 1841, in order that he may be bound by the proceedings in the cause. An examined copy of the bill is sufficient.

THIS was a motion on behalf of the Plaintiff, under the Order XXIV. of August, 1841, for leave to make entry in the Six Clerk's Office of the service, and time of the service, of a copy of the bill, omitting the interrogation part thereof, upon the Defendant *Benjamin Blew*, according to the Order XXIII. of August, 1841.

Mr. *Sharpe* and Mr. *Neate*, for the motion, said, it had been suggested by the Clerks in Court, that an office copy of the bill should

(a) See Cases on the operation of the Insolvent Acts, *Barton v. Tattersal*, 1 R. & M. 237; *Ward v. Painter*, 2 Beav. 85, Aff'd. by L. C. 7th of November, 1840; *Bowring v. Paris*, 5 Mee. & W. 117.

 1841.—*Blew v. Martin.*

be obtained and served upon the Defendant; but they submitted that it was not necessary to serve an office copy. The Order used the word "copy" not "office copy." An examined copy of the bill might be made by the Plaintiff's solicitor, and it would be sufficient to serve the Defendant with such examined copy. In the present case, an examined copy had been made; and the party making it had verified that copy, by referring to it in his affidavit as an exhibit (a), and the same copy, thus made an exhibit, had [*151] been sent into the country and served by another person upon the Defendant (b).

The VICE-CHANCELLOR made the order.

Upon notice, by Mr. &c., of counsel for the Plaintiff, it was alleged, that the Plaintiff hath exhibited his bill into this Court against the Defendants. That he doth not thereby seek any account, payment, conveyance, or other direct relief against the Defendant, *Benjamin Blew*; and doth not thereby, as against the said Defendant, pray a subpoena to appear and answer, but doth thereby pray that he, upon his being served with a copy of the bill, may be bound by all the proceedings in the cause. That a copy of the said bill, omitting the interrogating part thereof, was served on the Defendant,

(a) *X.* (of London) deposed that he had "compared and carefully examined the paper writing marked A., and shewn to deponent at time of swearing this affidavit with a bill filed by the above-named Plaintiff in this cause, on or about the 17th day of December, 1841, against the above-named Defendant*, and that the same is a true copy of such bill, omitting the interrogating part thereof, and that the said bill does not, as against the said Defendant, *Benjamin Blew*, pray a subpoena to appear and answer, but prays, that, upon his being served with a copy thereof, he may be bound by all the proceedings in this cause."

(b) *Z.* (of Bristol) deposed, that he did, on the 5th of January, 1842, personally serve the above-named Defendant, *Benjamin Blew*, with the true copy of the bill referred to in the affidavit of *X.*, sworn in this cause on the 4th of January, 1842, and marked with the letter A., filed by the above-named Plaintiff in this Court, against the above-named Defendants, by delivering to, and leaving with, the said *Benjamin Blew* the said copy bill.

* The copy was in this case made from the record after the bill was filed, and was sent into the country by the post.

 1841.—*Rendall v. Rendall.*

Benjamin Blew, on the 4th day of January, 1842, as by affidavit, now produced and read, appears. It is thereupon, ordered that the plaintiff do cause a memorandum of such service, and of the time when such service, was made, to be entered in the Six Clerks' Office.

Reg. Lib. A. 1841, fo. 214. C. M.

RENDALL v. RENDALL.

[152]

December 16. 18.

Where probate or administration has been granted by the Ecclesiastical Court, a receiver will not be appointed pending litigation to recall probate or grant of administration, unless a special case be made out for such appointment.

Where no probate or administration has been granted, it is of course to appoint a receiver, pending a bona fide litigation in the Ecclesiastical Court, to determine the right to probate or administration, unless a special case can be made for refusing such appointment.

The fact that the litigation in the Ecclesiastical Court is on the question of which of two alleged wills shall be admitted to probate, and that the Defendant in the suit in equity is named executor in both wills, is not a ground for refusing to appoint a receiver.

By a will, dated the 26th of September, 1829, alleged to have been made by the testator, *Simon Rendall*, amongst other bequests, a legacy of 150*l.* was given to the Plaintiff *George Rendall*, and certain benefits to the Plaintiff *Simon Rendall*, and the residue of the testator's property was bequeathed to and between the Defendant *William Rendall*, the Plaintiff *Simon Rendall*, and *Hester Sherborn*, share and share alike; and the Defendant *William Rendall*, and the Plaintiff *Simon Rendall*, were appointed joint-executors.

By another will, alleged to have been made the 3rd of July, 1841, the testator gave certain legacies (not including any legacy to *George Rendall*), and gave all the residue of his property to *William Rendall*, his executors, administrators, and assigns, absolutely, and appointed *William Rendall* sole executor.

1841.—*Rendall v. Rendall*.

The testator died on the 4th of July, 1841.

A suit was instituted in the Prerogative Court of the Archbishop of Canterbury to establish and obtain probate of the will of the 3rd of July, 1841; and on the 6th of December, 1841, an allegation in defence, on behalf of the Plaintiffs, and the other persons interested under the will of 1829, was admitted for the purpose of establishing that will, and setting aside the will, of 1841.

On the 6th of December, 1841, the bill was filed, praying that a receiver might be appointed to collect, get in, preserve the outstanding personal estate and effects of the testator, until the suit in the Ecclesiastical Court should be determined. A motion [*153] was now made *for the receiver. The affidavits in support of the motion stated, amongst other things, that the property of the testator, at the time of his decease, consisted of money in the funds, debts, (some of which were secured on mortgage), farming property, household furniture, and other effects. The affidavits in reply stated, that there was reason to believe that the suit in the Ecclesiastical Court would be determined in the ensuing Hilary Term.

Mr. *Sharpe* and Mr. *Follett*, in support of the motion.

The appointment of a receiver is of course, where there is property unprotected, and the representation is in contest. *Watkins v. Brent* (a), and the authorities there referred to. *Jones v. Goodrich* (b), *Wood v. Hitchings* (c), *Day v. Croft* (d). There is no case in which, under such circumstances, the receiver has been refused (e).

Mr. *Temple* and Mr. *Blunt*, contra.

A special case must be made out, as a ground for the appointment of a receiver. The party named in the will as executor is consider-

(a) 1 Myl. & Cr. 97.

(b) 10 Sim. 327.

(c) 2 Beav. 289.

(d) Id. 293, n.

(e) See 2 Beav. 294.

 1841.—*Rendall v. Rendall*.

ed at law and in equity as the proper party to administer the estate. He may act as executor notwithstanding probate has not been obtained. *Wills v. Rich* (a). Unless the estate be endangered, there is no necessity for the interference of this Court; and in the absence of any necessity, the Court will not throw upon the estate the expense of the appointment. There is also this fact which distinguishes the present case: the Defendant, *William Rendall*, is appointed executor in both of the alleged wills, and, therefore, *whatever the result of the suit may be, he will be [*154] the party to administer the estate. They cited *Atkinson v. Henshaw* (b), *Ball v. Oliver* (c).

Mr. *Sharpe* replied.

VICE-CHANCELLOR:—

I deferred my judgment, not from any doubt I entertained, but because it was insisted that the appointment of a receiver in this case would impugn the judgment of Lord *Cottenham* in the cases of *Walkins v. Brent* (d), and *Marr v. Littlewood* (e); and if so, I should have hesitated, although that hesitation would have belied my own confident opinion.

Two rules may, I believe, be stated with perfect safety. First,—Where probate or administration has been granted, a receiver will not be appointed pending litigation in the Ecclesiastical Courts to recall probate, unless a special case be made for doing so. Secondly,—Where no probate or administration has been granted, it is of course to appoint a receiver pending a bona fide litigation in the Ecclesiastical Courts to determine the right to probate or administration, unless a special case can be made for not doing so.

I need not, in this case, cite authority to prove the former proposition. The Defendant contends for that, and much more. He

(a) 2 Atk. 285.

(b) 2 Ves. & B. 85.

(c) Id. 96.

(d) 1 Myl. & Cr. 97.

(e) 2 Myl. & Cr. 454.

 1841.—*Rendall v. Rendall*.

says, where an executor is named in a will, the Court will not interfere against him without a special case; and that this rule was founded upon the principle that the executor derived [*155] his title under the will and not under the probate, and might act before probate; and the case of *Wills v. Rich* (a), before Lord *Hardwicke*, was referred to. I will not stop to observe upon the fallacy upon which this argument, as it is applied to the case now before me, proceeds. The question here is, not what an executor de jure may do before probate, but what this Court will do whilst it is in dispute whether the party claiming to be executor is so de jure or not. It is the latter of the two propositions which alone calls for observation, and which I certainly was surprised to hear questioned.

Lord *Redesdale* (b) states without qualification the general rule to appoint a receiver for the mere preservation of the property of a deceased person, pending litigation in the Ecclesiastical Court, although that Court itself may provide for the collection of the effects pendente lite.

In *King v. King* (c), opposite claims were set up under different wills, and a decision had been made that one will had not been sufficiently proved. It was objected, in opposition to the motion, that the property did not appear to be in danger, and that the Ecclesiastical Court would appoint a receiver pendente lite. Lord *Eldon* said, "This is almost a motion of course The Court goes upon this, that it will do its best to collect the effects. The property is in danger, in this sense, that it may get into the hands of persons who have nothing to do with it."

From this case, in which the rule of the Court is so clearly laid down, I pass to the late case of *Wood v. Hitchings* (a), in which the same principle was acted upon, the chief cases upon the subject having been referred to. I omit the

(a) 2 Atk. 285.

(b) *Treatise on Pleading*, pp. 109, 110, ed. 3rd; 135, 136, ed. 4th.

(c) 6 Ves. 172.

(d) 2 Beav. 289.

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intermediate cases, with this single observation, which I believe will be found correct, that the proposition laid down by Lord *Eldon*, in *King v. King*, is unimpeached by a single decision or dictum. Special reasons have sometimes been relied upon for not appointing a receiver, where there was no actual representative (as in *Jones v. Frost* (b);) but those very reasons affirm the general proposition, that, where there is no representative to collect the assets, and there is a bona fide litigation respecting the title to that representation, the appointment of a receiver, pending the litigation, is almost of course.

Then, has Lord *Cottenham* impugned the rule by any thing he did or said in *Watkins v. Brent*, or in *Marr v. Littlewood*?

In *Watkins v. Brent* he supported the *Vice-Chancellor's* order appointing the receiver, upon the express ground that Mr. *Brent* (by agreeing with his opponents that the question, as to the validity of the supposed testamentary papers, should be tried in an existing suit to recall probate) had "treated himself as not being complete executor;" and his Lordship added,—“I consider that there was a sufficient case for the *Vice-Chancellor's* appointing a receiver, on the ground that *William Brent Brent* had recognised such a proceeding.” In *Marr v. Littlewood*, the same learned Judge appointed a receiver, upon the application of the actual executor, pending a suit to annul probate, upon the ground that the opposing party, by having given notice to the debtors to the estate not to pay to the Plaintiff (the actual executor,) had destroyed the effect of the probate, and “produced, by her own act, an incapacity on [*157] the part of this executor to proceed under the probate in collecting and preserving the assets. His Lordship immediately adds,—“The doctrine laid down by Sir *John Leach*, in *Jones v. Frost*, does not in the least interfere with the ground upon which I proceed here. In that case it did not sufficiently appear that there was a litigation pending in the Ecclesiastical Court; whereas here, unquestionably, such a litigation is now depending.”

(b) 2 Mad. 1.

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These decisions are direct authorities for the latter of the two propositions I have stated, for Lord *Cottenham* reduces each case into the same two elements:—first, no executor with right or power to act:—secondly, bona fide litigation of the right to probate; and thereupon he appoints the receiver. If, upon the facts of either of these cases, a right or power to act could be supposed to exist, the case would be the stronger in support of this view.

The only question then is, whether Lord *Cottenham* said any thing in *Watkins v. Brent* opposed to what he decided. Now, in that case, there had been two executors named in the supposed will, namely, *Margaret Brent* and *William Brent Brent*. Probate had been granted to *Margaret Brent*, who was dead, but the Lords Commissioners were pressed with the argument, that, probate having been actually granted to *Margaret Brent*, the will was thereby duly authenticated by an instrument which a court of law could take notice of, and that the probate granted to *Margaret Brent* enured to *William Brent Brent*, the other executor; and *Brooks v. Stroud* (a) was cited in support of the argument. In *Watkins v. Brent*,

it will be observed, that *William Brent Brent* had been [*158] treated in the Ecclesiastical Court as "executor by virtue of the probate granted to *Margaret Brent*, for in the original suit against her to recall the probate, which had been granted to her, he became a defendant after her death, and in her stead. But, however that may be, it is clear that Lord *Cottenham* argued the case against *William Brent Brent* upon the footing of his being executor by force of the probate granted to *Margaret Brent*; for, after referring to cases in which this Court had refused to interfere against an executor in whose favour there had been an adjudication by the Ecclesiastical Court, he concludes with the statement that *William Brent Brent* had, in that case, "treated himself as not being complete executor,"—a statement which was untrue in the sense of his not being named executor in the will, and true only in the sense of his being named executor with a litigated title. I cannot well im-

(a) 1 Salk. 3; 7 Mod. 39.

 1842.—Tatham v. Williams.

agine a stronger case in the Plaintiff's favour than the case of *Watkins v. Brent*. Nor can I better conclude these observations, than in the language of Lord *Cottenham* (a), "There is no doubt that by the rule of this Court, if the representation is in contest, and no person has been constituted executor, the Court interferes, not because of the contest, but because there is no proper person to receive the assets (b).

*TATHAM v. WILLIAMS.

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1842.—January 20.

An affidavit, that the deponent has inquired of and been informed by the clerk in court, and the deponent believes it to be true, that no appearance has been entered by the Defendant, is sufficient to satisfy the Court of that fact.

It is necessary, in applications under the 8th Order of August, 1841, that the affidavit of service of the subpoena should state that the memorandum, in the form prescribed by the 14th Order, was at the foot of such subpoena—*Scmble*.

Mr. *Koe*, on behalf of the Plaintiffs, moved for leave to enter an appearance for the Defendants, *Mary Anne Bowser* and *George Bowser*, under the Order VIII. of the 26th of August, 1841.

The motion was made upon affidavit, which stated the fact of service of the subpoena, and of the indorsement thereon, upon the Defendants (c). There was no certificate that the Defendants had not

(a) *Watkins v. Brent*, 1 Myl. & Cr. 102.

(b) His Honor at the conclusion of the judgment observed, that the question raised in *Watkins v. Brent* as to the extent to which probate granted to one of several persons named executors in a will, ensured to the others, had been much argued in *Twyford v. Traill* (7 Sim. 92), and that the Vice-Chancellor of England had offered to send a case to a court of law upon the question; but counsel having declined that offer, his Honor had decided the case before him, upon his own experience of the practice of conveyancers.

The same question was argued on a plea in *Strickland v. Strickland*, before the Vice-Chancellor of England, 10th and 15th June, 1841.

(c) It has been made a question, whether the affidavit ought to state, that there was at the foot of the subpoena a memorandum in the form prescribed by the 14th

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appeared, and it was said that the clerks in court declined to give such certificates. The fact that no appearance had been entered was shewn by affidavit (a).

The VICE-CHANCELLOR made the order.

Order of August, 1841. The latter Order only substitutes a new form of memorandum, instead of that pointed out by the 1st Order of December, 1833, under which the memorandum is clearly made part of the document intituled the subpoena; and the new form of memorandum was also considered by the Courts to be a part of the subpoena in some of the earlier applications under the 8th Order. The subpoena however, appears, in one case, since the Orders came into operation, to have been, issued without the memorandum at the foot, and the practice has since been adopted of requiring that the affidavit of service shall go to the fact that the memorandum was actually at the foot. In *Williams v. Griffiths*, January 11th, 18th, 1842, the affidavit of service stated that the memorandum was at the foot of the subpoena which was served, and upon that affidavit the order for leave to enter the appearance was made Mr. Craig for the motion.

(a) G. (of London), deposed, that he "did, on the 12th of January, instant, inquire of the clerk or agent of Mr. Smith, who acts as clerk in court for the above-named Plaintiffs in this cause, whether the above-named Defendants, *Mary Anne Bowser* and *George Bowser*, or either of them, had caused an appearance or appearances to be entered to the original and supplemental bill and bill of revivor and supplement of the above-named Plaintiff, or to either of them; and that deponent was then informed by the said clerk or agent of the said Mr. Smith, that the said Defendants, *Mary Anne Bowser* and *George Bowser*, had not, nor had either of them, entered any appearance to either of the said bills, as he verily believed; and deponent saith, that he verily believes that neither the said Defendant, *Mary Anne Bowser*, nor the said *George Bowser*, has appeared to the said original and supplemental bill and bill of revivor and supplement of the said Plaintiffs."*

* The Statute 4 & 5 Will. 4, c. 82, enacts. "That it shall be lawful for the Courts of Chancery, &c., in the cases therein mentioned, to order an appearance to be entered for such party in such manner and at such time as the said Courts respectively shall direct." In *Angell v. Davis*, 31st of January, 1842, Mr. Wood applied for an order to enter an appearance under that Statute, and stated, that, in a case of *Sprott v. Strange*, 31st of January, 1842, which was an application under the 2th Order of August, 1841, Sir J. L. Knight Bruce, V. C., had ordered that the appearance should be entered by the Senior Six Clerk not towards the cause, and had intimated that he should adopt that form in all future cases.

Sir J. Wigram, V. C., said, that he should in future adopt the same rule, and direct the appearance to be entered by such Six Clerk, on applications under the 8th Order.

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1841.—November 23 & 24 ; December 3.

The testator directed his real and personal estate to be converted, got in, and invested in government or real securities, and the interest, dividends, and annual produce to be paid to his wife for her life. The greater part of the testator's property at his death consisted of capital in a partnership business abroad, to be withdrawn, by instalments, in the course of three or five years, at the discretion of his executors, and bearing interest at five per cent. in the mean time.

Held, that the tenant for life would be entitled to the income actually produced by such of the property of the testator as was invested according to his will, from the time of such investment ; but that she was not entitled during the first year after the testator's death to a larger income, in respect of such part of the testator's property as was not so invested, than the property would have produced, if invested according to the will. See *Coldecott v. Coldecott*, 1 Y. & C. 319, and the cases there cited.

IN July, 1836, *Joseph Charles Taylor* entered into partnership with *John Fladgate*, in the business of merchants, at *Oporto*, in the kingdom of *Portugal*. The articles of co-partnership were to the following effect :—The partnership to continue for nine years—the capital for the first three years being 80,000 francs, of which three-fourth parts should be contributed by *Joseph Charles Taylor*, and the remainder by *John Fladgate* ; and interest at the rate of five per cent. to be a charge both on the debit and credit side of all accounts, and interest at that rate allowed to either partner upon any amount of capital actually advanced by him beyond his required share. In case of the death of either partner at any period between the 1st of January and the 30th of June, the business was to be continued on the same footing until the 1st of July then next, and the annual balance then struck ; but, on the death of either of them at any other period of the year, the partnership was to close on the day of such death. After the death of either partner, or the close of the partnership, a valuation to be made of the stock and property, and the last annual account of the partnership to be binding ; and, in case *Joseph Charles Taylor* should die during the first five years of the said co-partnership, his share in the capital stock and profits of the partnership at the time of his death to be

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paid to his representatives by *John Fladgate*, in three equal instalments, at the end of the first, second, and third year [*162] from the day of the *death of *Joseph Charles Taylor*, or from the end of the then current year of the partnership, together with interest thereon, at the rate of five per cent. per annum, to be calculated from the termination of such partnership. The book debts due to the firm at the time of the death of *Joseph Charles Taylor* to be considered as part of the profits, but not to be divisible until received.

The partnership began, and the business was continued, according to the articles, until the 1st day of July after the death of *Joseph Charles Taylor*.

Joseph Charles Taylor, by his will, dated the 3rd of January, 1837, after directing the payment of his debts and funeral and testamentary expenses, confirmed the settlement which had been made upon his marriage with the Plaintiff, *Elizabeth Margaret Taylor* under which she was entitled to the interest of two sums of 5000*l.* Consols for her life, and also to an annuity of 300*l.* in case she should survive him; and he directed that a sufficient portion of his personal property should be invested in the public funds to satisfy that annuity. The testator then bequeathed several legacies to his nephews and nieces and their respective children or issue, with an ultimate gift over in the event of the said bequests not taking effect. The testator then gave, devised, and bequeathed his money, securities for money in the foreign or English funds, stock in trade, and all the rest and residue of his estate and effects, real and personal, and of what nature and kind soever, and whether situate in *Great Britain*, in the kingdom of *Portugal*, or elsewhere, unto his executors, *M. Clark*, *T. Philpotts*, *R. Woodhouse* and *M. Leach*, their heirs, executors, administrators, and assigns, according to the respective qualities thereof, upon trust, as soon as conveniently [*163] might be after his decease, (subject to the *discretionary power thereafter given to his executors as to his partnership property), to sell and convert into money, or otherwise collect, get

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in and receive his said real estate (if any), and all such part of his personal estate as should not consist of money, or money in the English funds, and to stand possessed of the monies to arise by such sale, conversion, or collection as aforesaid, and also of so much and such part of his personal estate as should consist of money, or money in the English funds at the time of his decease, after the satisfaction of the several directions thereinbefore contained, upon trust to lay out and invest all such part of his residuary estate as should not consist of money in the English funds, in some or one of the public or parliamentary stocks or funds of *Great Britain*, or on real securities in *Great Britain*, bearing interest, in the names or name of them the said *M. Clark*, and *T. Philpotts*, *R. Woodhouse*, and *M. Leach*, or the survivors or survivor of them. And the testator thereby declared, that the said *M. Clark*, *T. Philpotts*, *R. Woodhouse*, and *M. Leach*, or the survivors or survivor of them, or the executors, administrators, or assigns of such survivor, should stand possessed of and interested in the English stocks or funds of which he might die possessed, and also of the stocks or funds and securities so to be acquired, upon trust to pay unto or otherwise to permit his said wife, *Elizabeth Margaret Taylor*, to receive the interest, dividends, or annual produce thereof, as the same should become due, for the term of her natural life, for her sole and separate use; and from and after the decease of his wife, as to the whole of his residuary estate, and the stocks, funds or securities, in or upon which the same should or might be invested, upon the trusts therein declared, for the benefit of certain other persons. And the testator thereby empowered his executors to extend the time for payment by *J. Fladgate*, of any portion of the capital out of the partnership business, to any period not [*164] exceeding five years, from his decease.

The testator died on the 4th of January, 1837. The bill was filed by *Elizabeth Margaret Taylor*, the widow, for the administration of the testator's estate, against the executors, and also against the parties entitled under the ultimate bequests of the residue. The decree made in November, 1839, referred it to

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the Master to take the accounts of the estate, in the manner thereby directed.

The Master's report was made in November, 1840, and he found, that, at the time of the testator's death, there was due to him from *J. Fladgate*, on account of the partnership concern, 176,927 milreas, 563 reas of Portuguese currency, which in British sterling amounted to 41,098*l.* 16*s.*; and that 47,867*l.* 15*s.*, part of the testator's property, arose from capital; and 3378*l.*, other part thereof, arose from interest: and that *J. Fladgate* had remitted to the executors the sum of 35,000*l.*, part of the 41,098*l.* 16*s.*, with interest. And he found that the sum of 32,172*l.* 19*s.* 6*d.*, part of the 47,867*l.* 15*s.* 1*d.*, which arose from the capital of the testator's property, arose from the stock in trade and capital of the testator's business, and that no profits had been made of the business after the death of the testator, but a loss of 25*l.* 11*s.* had been sustained thereby. The cause now came on for further directions.

The question was, whether the Plaintiff, as tenant for life, was entitled to the whole or any part of the 3378*l.*, of which 2827*l.* arose by interest of the capital in the partnership, and 551*l.* by interest of simple contract debts due to the testator, and temporary investments of parts of his estate by his executors.

[*165] **Mr. Temple*, and *Mr. Harrison*, for the Plaintiff.

Mr. Sharpe, and *Mr. N. Matcham*, for parties entitled to the residue in remainder after the death of the tenant for life.

Mr. Loftus Lowndes, and *Mr. Beales*, for the executors.

No distinction was made in the argument between the interest of the property invested in the partnership, and the interest of other parts of the property arising prior to its permanent investment, according to the directions of the will. The several modes in which it was contended by the parties that this interest might or ought to

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be distributed, are mentioned, and the reasoning applicable to them is considered, in the judgment.

The following authorities were cited:—

Sitwell v. Bernard (a), *Gibson v. Bott* (b), *Howe v. Earl of Dartmouth* (c), *Fearns v. Young* (d), *Holland v. Hughes* (e), *Taylor v. Hibbert* (f), *Hewitt v. Morris* (g), *Angerstein v. Martin* (h), *Stott v. Hollingworth* (i), *Parry v. Warrington* (k), *Amphett v. Parke* (l), *La Terriere v. Bulmer* (m), *Dimes v. Scott* (n), *Vickers v. Scott* (o), *Douglas v. Congreve* (p).

VICE-CHANCELLOR:—

I was informed at the bar, at the time this case was argued, that the property of the testator, other than that "in ['166] *Portugal*, was so circumstanced in point of amount, actual investment, or otherwise, as not to require any special directions from the Court, and accordingly the argument was confined to the question respecting the testator's property in *Portugal*; and to that question my attention has therefore been directed.

The Plaintiff, the tenant for life of the residue, claims one of four things, in the following order:—First, she claims to be entitled from the time of the testator's death, until the property in *Portugal* shall be got in and invested in the manner directed by the will, to the income actually derived from that property, whatever it may be, and on whatever account paid; and from the time of such investment she claims the income which the investment may produce. In support of this claim, the Plaintiff relies upon the special intention of the testator to be collected from his will. Secondly, if her

(a) 6 Ves. 520.

(d) 9 Ves. 552.

(f) 1 J. & W. 302.

(i) 3 Madd. 121.

(n) 2 Sim. 18.

(p) 1 Keen, 410.

(b) 7 Ves. 94.

(e) 16 Ves. 112; 8 C. & Mer. 685.

(g) T. & R. 241.

(k) 5 Madd. 155.

(m) 4 Russ. 195.

(c) 7 Ves. 137.

(h) T. & R. 222.

(j) 1 Sim. 375.

(o) 3 Myl. & K. 500.

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first claim should be disallowed, she claims to be entitled to the first year's income actually derived from the property in *Portugal*, and, after the expiration of that year, she claims an income equal to that which would be produced by its investment in the manner directed by the will. And for this she relies upon *Angerstein v. Martin* (a), and *Douglas v. Congreve* (b). Thirdly, if her two first claims should be disallowed, she claims to be entitled from the testator's death to the income which would be produced by the investment of the property according to the directions in the will. And for this she relies upon *Dimes v. Scott* (c). Fourthly, failing her three first claims, she insists that she is entitled to have the property considered as converted, at the end of the first year after the testator's death, into the securities directed by his

[*167] will, and to have, from the expiration of that year, the income which would be produced if such conversion had actually taken place.

On the other hand, the parties interested in the residue contend:—First, that the declared intention of the testator is, that the property in *Portugal* should not be got in until periods remote from his death; and that no interest is given to the Plaintiff, except out of the fund into which the property is directed to be converted after it is gotten in. And, consequently, that the tenant for life of the residue is not entitled to any income in respect of the property in *Portugal*, until it is actually gotten in and invested, as the will directs. And, secondly, it is said, for the same parties, that the first, second, and third grounds of claim by the tenant for life are inadmissible, and that in no view of the case can she have larger rights than her fourth claim would give her.

To the argument of the parties interested in remainder after the Plaintiff's death, so far as it denies her right to any income in respect of the property in *Portugal*, until that property is gotten in and actually invested, I cannot accede. It is true, indeed, that the testator has not, in terms, given the tenant for life any benefit

(a) *Turn. & Russ.* 332.(b) 1 *Keen*, 410.(c) 4 *Russ.* 195.

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from his residuary bequest, except out of his property when converted into particular investments, and not until the property is so converted; but I cannot consider this alone to be an answer to the Plaintiff's claim to have some income out of the property in *Portugal*, before it is gotten in and invested in the manner which the will directs. The Defendant's argument, so far as it depends upon the strict language of the will, would apply with as much force to every other part of his property as to that in *Portugal*. But to this strict and literal interpretation of the will all authority and daily experience are opposed. So far, indeed, has *the Court [*168] gone upon this subject, that, even where a residue was directed to be laid out in the purchase of land, and the income to be accumulated until a suitable purchase of land could be found, and to be laid out with the principal, and the rents only of the land *when* purchased were directed to be paid to the tenant for life, the Court gave to the tenant for life the income of the residue from one year after the testator's death, *before* it was laid out in land. *Sitwell v. Bernard* (a). The Court, in such cases, considers the interest of the legatees as the general and primary object of the testator, and treats his direction to convert and invest the property as a particular and secondary object—a mode, in fact, of carrying the primary object into effect, and nothing more. In many cases it would be impossible to get in the property within a reasonable time. In some it could only be done at a ruinous loss to the estate. In others, the different degrees of dilligence used by trustees and executors would materially affect the interests of a legatee for life, and might (as Lord *Eldon* observed in *Sitwell v. Bernard*) equally affect the interest of those in remainder. To obviate these and other inconveniences, and to give effect, as near as may be, to the testator's intention, the Court, acting upon a general rule, (*Gibson v. Bott* (b), *Walker v. Shore* (c),) feigns the property to be converted, as directed by the testator, at the end of one year from his death, and, at least from that time, gives to the tenant for life the precise income which would be produced if the property were actu-

(a) 6 Ves. 520.

(b) 7 Ves. 24.

(c) 19 Ves. 357.

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ally so converted, and in its proper state of investment. By doing this, the Court gives the tenant for life as large an amount of income as the testator intended, and nothing more.

This rule must apply here, unless the language of the [*169] "will be clearly incompatible with it. But I cannot consider, that the general and primary intention of the testator to benefit his widow is countervailed by a direction in his will applicable only to the convenient realization of his estate. I am satisfied that I am only applying to this case—and not in any manner extending—the principles laid down by Lord Eldon in *Sitwell v. Bernard*, when I hold that the tenant for life is entitled at the least, from the end of one year after the testator's death, to an income computed upon the supposition that the whole of his property was actually converted at that time into the proper investments.

Excluding for the present the question, whether the tenant for life is to receive any income in respect of the property in *Portugal*, during the first year after the testator's death, and what amount of income (if any) she is to receive during that first year, I will next consider the widow's claim to be paid the actual income derived from the testator's property in *Portugal*, after the expiration of the first year from the testator's death. This claim appears to me untenable: the argument in support of it was, that the testator having directed that the property, which was his capital in business, should or might remain in *Portugal* for a limited time, to be determined at the discretion of his executors, that capital must be considered as in a proper state of investment whilst it remained in *Portugal*; and that, if the investment were proper with reference to the testator's directions, the tenant for life must be entitled to the income it produced. This reasoning cannot, I think, be adopted. I cannot treat the testator's directions as to his property in *Portugal* as of the essence of his will, and, at the same time, treat, as merely directory, those other parts of the will, which, according to a strict [*170] interpretation, would exclude the Plaintiff from taking any benefit from the residuary gift for her life, until the property was actually invested in the manner directed by the will. It

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is only by considering and treating the directions for realizing and investing the property, as subordinate to the testator's primary object of benefiting his legatees, that the tenant for life, under the general rule of the Court, gets an income from the property before it is actually converted.

My opinion, therefore, is, that, for the purpose of determining the amount of income to which the Plaintiff is entitled from a year after the testator's death, the property in *Portugal* must be considered as converted and placed in a proper state of investment at that time. I must be understood, however, as speaking only of the measure of the income to which the tenant for life is entitled, and not as declaring that she can necessarily demand payment of an income to that amount, until the property in respect of which it is payable shall be gotten in.[1]

The remaining question is one of great difficulty. What are the rights of a residuary legatee for life during the first year after the testator's death, where the residue is directed to be invested in a

[1] It is a general rule for convenience, to consider the personal estate of a testator, to have been reduced into possession in a year from the death of a testator, and therefore interest is given upon legacies from that period, unless some other is fixed by the will, though actual payment within that time, in many cases may be impracticable. *Hammond v. Hammond*, 2 Bl. 306. *Wood v. Penogre*, 13 Ves. 333.—*Bourke v. Rickett*, 10 Ves. 333. As a general rule legacies are payable in one year, even though assets are not productive, or the Executor have not reduced the property into possession, and there is no exception on the ground of the legatee not being in a situation to receive, or omitting to demand. *Marsh v. Hague*, 1 Edw. V. C. R. 175.

Where a testator having three illegitimate children, (two sons and a daughter,) gave £18,000 to Trustees, in trust out of the interest, to pay £100 a year for the maintenance and education of each of them during their minorities, and to accumulate the residue, and add it to the principal, and to pay one third of the aggregate fund to each of the sons on his attaining 21, and out of the remaining third, to pay £1000 to the daughter on her attaining 21, or marrying under that age *with the consent of the Trustee*, and to stand possessed of the residue in Trust for her separate use and for her life, and the testator directed all the legacies given by his will to be paid within three months after his death. The sons attained 21 in the testator's life time and the daughter married under that age with the testator's consent. It was held that these legacies became payable at the testator's death, and that they bore interest from that time. *Coventry v. Higgins*, 14 Sim. 30.

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particular manner, and the income produced by such investments is to be paid to the residuary legatees?

Four possible solutions of this question may be suggested, and the highest authorities, and of modern date, may be cited in support of each. One answer to the question might be, that the tenant for life of a residue is entitled to no income from it until the expiration of a year from the testator's death, in whatever state of investment it may be. This is supported by the opinion *of [*171] Sir John Leach in *Stott v. Hollingworth* (a), and of Sir Thomas Plumer in *Taylor v. Hibbert* (b); and it would be extremely difficult to interpret the language of Lord Eldon, in *Sitwell v. Bernard*, so as not to support the same opinion.

A second answer to the question might be found in the opinion of Sir Anthony Hart, as expressed in the case of *La Terriere v. Bulmer* (c). He there decided that the tenant for life would be entitled to the income accruing during the first year after the testator's death, on such parts of the testator's estate as were invested at his death upon the proper securities, and on such parts as were afterwards so invested during the same year, but not to the income of property not so invested. And *Gibson v. Bott* (d) supports the same view.

A third answer to the question is found in the cases of *Angerstein v. Martin* (e) and *Douglas v. Congreve* (f). In *Angerstein v. Martin*, Lord Eldon gave the tenant for life the income of property directed to be laid out in land, during the first year after the testator's death. Part of the property was in the Russian funds, a security in which it would not have been lawful for the trustees either to have placed it, or to have left it. It was not in the proper state of investment. But Lord Eldon made no distinction between the income of that and the other property. The present Master of the Rolls has since followed that case in *Douglas v. Con-*

(a) 3 Madd. 161.

(b) 1 Jac. & Walk. 308.

(c) 2 Sim. 18.

(d) 7 Ves. 95.

(e) T. & R. 232.

(f) 1 Keen, 410.

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greve, giving a tenant for life the income of the residue during the first year after the testator's death, without reference to the investment in which he found it. In the absence of such an authority *as the last, I should have thought it clear that [*172] the distinction taken by the *Vice-Chancellor* in *La Terriere v. Bulmer* was right; and that Lord *Eldon's* decree in *Angerstein v. Martin* was not intended to impeach the law as laid down in *La Terriere v. Bulmer*. For, although Lord *Eldon's* order in *Angerstein v. Martin* included Russian stock, the language of his judgment appears to apply to funds in their proper state of investment, and to no others. And I cannot but think that Lord *Eldon's* attention was not called to the Russian funds, or at least not directed to them, in the language he used. His argument is this:—"The testator gives the rents of the land from the moment it is purchased, and he gives the income of the money which is to purchase the land, until it is purchased, to the same persons, and in the same way, as the rents of the land when purchased." Now this is true, as regards the income of the money when in its proper state of investment, but not before. How then can the argument apply to the income of property not invested in the manner directed by the testator? Where the Court in the common case, for the purpose of giving the tenant for life an immediate income, considers and treats the property as converted, though not actually converted, it gives the tenant for life that income only which the testator gave, and intended the tenant for life should have. If he is to have the actual income during the first year, why should he not have it continuously until the proper investment is actually made? If I am wrong in supposing that *Angerstein v. Martin* must be so understood, I must consider Lord *Lyndhurst* as having over-ruled *Angerstein v. Martin* to that extent, by *Dimes v. Scott*, and I should have had no difficulty to contend with, if *Douglas v. Congreve* had not revived *Angerstein v. Martin* at the expense of *Dimes v. Scott*. Upon the case of *Douglas v. Congreve*, I observe, with *great [*173] humility, that it appears to me to be a decision, which, if indiscriminately applied, would often work injustice. Suppose, for example, the residuary estate to consist wholly or principally of

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leasehold property of large annual value, but for terms of years, which had only a year or two to run. The tenants for life, upon the principle of *Douglas v. Congreve*, might take the substance of the property, leaving little or nothing for the remainder-man. A leasehold estate yielding 10,000*l.* a year, which had only one year to run at the death of the testator, would go wholly to the tenant for life.

The fourth answer to the question which might be suggested is supported by *Dimes v. Scott*. In that case Lord *Lyndhurst* decided, that the tenant for life of a residue directed to be converted into money, and invested in government or real securities, was not entitled during the first year after the testator's death, to the income derived from some Indian securities; but that he was entitled during that period to the dividends on so much three per cent. stock as would have been produced during the year by the conversion of the property at the end of the year.

I am now placed in this embarrassing position:—that, obliged to decide the question in this cause, I cannot do so without in effect overruling the decision of one or more Judges whose opinions are of higher authority than mine can be.

To express my unfettered opinion upon the subject, I should say that the decision in *La Terriere v. Bulmer* was altogether right; and that, so far as that is impugned by the decision in *Dimes v. Scott*, the latter decision was to be regretted. To give to the tenant for life the income from lands in their proper state of investment, during the first year, is, according to the testator's expressed intention—
 [*174] to give to the tenant for life, as in *Angerstein v. Martin* and *Douglas v. Congreve*, the income of property not in the proper state of investment—is to give him what the testator has neither given him nor intended him to have. To postpone until the end of a year after the testator's death, the enjoyment by the tenant for life of funds not in the proper state of investment, as in *La Terriere v. Bulmer*, is merely assimilating the case of a residuary legatee for life to that of other general legatees. To give to the tenant for life an income during the first year, calculated upon the prin-

 1841.—Taylor v. Clark.

ciple of a supposed conversion of the property into three per cent. stock, to make a distinction between the case of a residuary legatee and all other general legatees. *Dimes v. Scott*, so far as that point was concerned, is a case of the first impression.

In *Gibson v. Bott* (a), Lord *Eldon*, pointedly, says—"The course is an account, and the tenant for life to take the interest from the end of the year. In every case, it is hard that he should lose the interest for that year." And, again, "If an annuity is given, the first payment is made at the end of the year from the death; but if a legacy is given for life, with remainder over, no interest is due until the end of two years." On a subsequent day, he said, "The whole practice of the Court is against special directions as to the value at the time of the death." With respect to one leasehold estate, he directed a value to be put upon it, and that the tenant for life should have 4 per cent. from the testator's death upon such value. The decree, however, contains a special declaration as to the reason of this exception; and with respect to the general estate, gives the tenant for life interest only from the time of the conversion, or "feigned conversion, of the property. *Walker v. Shore* is also a [*175] case in point.

In the difficult position in which I am placed, I feel bound to follow the decision of the present Lord Chancellor in *Dimes v. Scott*. I feel bound to follow his authority as the present head of the court. That decision (I respectfully observe) most nearly accords with my own humble judgment upon the point. It gives what the testator gave and intended to give. That decision, if my observations upon it may be supposed well founded, is only to be regretted in having perhaps introduced a distinction, where there is no substantial difference, between the cases of a residuary legatee for life and other legatees.

I cannot conclude these observations without expressing my hope that the amount of property at stake in this cause may be such as

(a) 7 Ves. 95.

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to justify an appeal from this to a higher Court. The question is one of frequent occurrence, involving interests of large amount. It is deeply to be lamented that such a point should not be finally settled.

If, in applying what I have decided to the facts of the case, any difficulty should arise, the case may be spoken to upon minutes.

[The cause was not mentioned again.]

[*176]

**BLAKESLEY v. WHIELDON.*

1841: December 15, 16, 17, & 24.

Usual and proper covenants.

In a contract for sale of the minerals under a given quantity of surface, at a certain price, payable by instalments, the times of payment to be accelerated if more than a certain quantity of minerals should be gotten from time to time, the vendor impliedly reserves the power of entering and inspecting the mines, to ascertain the quantity of minerals from time to time gotten therefrom; and the vendor is entitled to a specific performance of the contract, with a covenant reserving such power in the conveyance.

THE Plaintiff and the Defendant entered into a contract in the following terms:—

“Memorandum of an agreement made this 6th day of April, 1838, between *Charles Blakesley*, of &c., of the one part and *George Whieldon*, of &c., of the other part, as follows, namely, the said *Charles Blakesley* agrees to sell, and the said *George Whieldon* agrees to purchase, all the coal-mines and minerals lying under two fields, situated in the parish of *Exhall*, in the county of *Warwick*, [description and boundaries], and which contain twelve acres, at or for the price of 350*l.* per acre, with full power for the said *George Whieldon*, his servants, and workmen, to enter upon the surface, and to search for, dig, bore, sink, and use every other means neces-

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sary for getting, raising, and selling the said mines and minerals, paying all reasonable compensation to the occupier of the said two fields for any damage that may be done to the surface thereof by such digging, boring, sinking, &c. And it is hereby further agreed, by and between the said parties hereto, that the said *George Whieldon* shall pay down, on the execution of the conveyance, the sum of 350*l.*, being the price of one acre of the said mines and minerals; and the like sum of 350*l.* at the least, at the end of every succeeding year, till the whole of the said twelve acres of mines and minerals shall be paid for, whether the quantity of one acre shall be got and raised in each year or not; and that, if more than one acre thereof shall be got and raised in any one year, then an additional sum shall be paid for such excess, in the same proportion of 350*l.* per acre; and if the said two fields do not contain so much [*177] surface measure as twelve acres, then the deficiency is to be made up from the next adjoining field or fields; and, lastly, it is agreed, that the said *Charles Blakesley* shall at his own expense, make out a good title to the said mines and minerals, and deliver an abstract thereof to the said *George Whieldon* as soon as may be; and that the said *George Whieldon* shall pay for the conveyance of the said mines and minerals.

(Signed)

CHARLES BLAKESLEY,
GEORGE WHIELDON."

Differences subsequently arose between the parties in settling the draft of the deed by which the contract was to be carried into effect; and these were ultimately reduced to one question, namely, whether the Plaintiff should have power to go down into any of the mines of the Defendant, which might be necessary, for inspecting the working of the mines comprised in the contract; or whether the power, if granted, should not be confined to the mere reservation of a right to descend any pits or shafts sunk on the land over the demised mines. The Defendant declined to execute a deed giving the Plaintiff any power to descend, for the purpose of inspection, any pits or shafts not upon the land over the mines, which he had contracted to purchase from the Plaintiff.

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The bill was filed in March, 1839, and stated, that the Defendant was owner of certain mines contiguous to the mines contracted to be purchased by him from the Plaintiff; and he intended not to sink any pit or shaft on the land over the mines contracted to be purchased from the Plaintiff, but to work the same by means of the pits or shafts by which he worked the other mines; that, in [*178] working his said mines, the Defendant had worked over the boundary of the Plaintiff's mines, and had got coal from them, and thus entered into possession, but had paid no part of the purchase-money.

The bill prayed, that the agreement might be specifically performed, and that it might be declared that the Plaintiff and his agents ought to have a reasonable right of entry into the mines during such times as any part of the purchase-money should remain unpaid, and that it might be referred to the Master to settle the draft of the deed of conveyance and covenants to be executed by the Plaintiff and the Defendant for carrying the agreement into effect.

The Defendant, by his answer, admitted the agreement, and that he had since worked the mines thereby contracted to be purchased. The defendant also said, that he was very conversant with the working of coals and other minerals; and he believed that, in leases of minerals, or in sales of minerals, to be paid for by a royalty, according to the quantity of coals or minerals raised and gotten from or out of the lands and hereditaments so demised or sold, it was usual to insert powers authorizing the landlord or vendor, as the case might be, to enter and inspect the workings for such coals and minerals, in order to see that no waste was committed, and that the said coals and other minerals were worked in a proper and workman-like manner; but that, in the purchase of minerals by surface measure, no such power was, in ordinary cases, given to the vendor.

Several witnesses, mining agents, and others, examined on behalf of the Plaintiff, deposed that it was agreeable to the [*179] usage and custom of the mining districts in that part of the county of Warwick, as between the seller and pur-

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chaser of mines, in cases where the time and mode of the payment of the consideration money depended on the manner of working the minerals, and the extent to which the same were worked in each year, that a power of entering into the mines, for the purpose of viewing the same, should be reserved to the seller. On behalf of the Defendant, several witnesses deposed, that, in leases and sales of mines by royalty, the lessor or vendor usually reserved a power for a mine agent to go down to inspect the work, and see that the mines were properly worked; but in a sale of mines by surface measure, they never knew such a power reserved to the vendor.

Mr. Sharpe, and Mr. James Parker, for the Plaintiff.

Mr. Boteler, and Mr. Cockerell, for the Defendant.

The title of the Plaintiff to require the introduction into the deed of the covenant in question, was argued, first, upon the ground of whether it was a reasonable and necessary covenant for the protection of the interest which the vendor had under the deed; secondly, upon the evidence of custom; and, thirdly, upon the conduct of the parties.

To the third ground, as it formed no element in the judgment, it has been thought necessary to refer in the statement of the case.

VICE-CHANCELLOR ;—

I abstained from giving a final judgment in this case at the close of the argument, from the desire of referring, before I did so, to the cases that illustrate the principle by which my present decision must be governed, "in order that it might distinctly appear to what extent the judgment I should pronounce depended upon [*180] on general principles, and to what extent it depended on the evidence given in this cause.

The general principles of law, that, where a person makes a grant of any given thing, he impliedly grants that also which is necessary to make the grant of the principle subject effectual, does not admit of

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dispute (a) : *Pomfret v. Riccroft* (b)[1]. And this principle is carried to the extent, that the implied grant entitles the lessee to whatever is necessary to the full enjoyment of the subject of the grant : *Senhouse v. Christian* (c). In determining what are usual and proper covenants in a case like that before me, regard must be had to the principle I have referred to : for the reasoning which would apply to a grant, must in principle apply to a case like the present, so far as relates to the right of the parties to have preserved to them, not only the interest, but the means of protecting the interest which they are to take. Further than that I do not consider I ought to go.

In *Henderson v. Hay* (d), the question was, whether, under an agreement to grant a lease upon common and usual covenants, the lessor was entitled to a covenant from the lessee not to assign without license. Lord *Thurlow* decided, that the lessor was not so entitled, upon the ground that common and usual covenants could only be understood to mean covenants " incidental to the lease." By the term, " incidental to the lease," I understand Lord *Thurlow* [*181] to mean such covenants as were necessary to protect a leasehold interest, without affecting its legal incidents, and no other covenants. Considerable doubt appears to have been thrown upon this decision by the case of *Morgan v. Slaughter* (e), and the case of *Folkingham v. Croft* (f). But in the subsequent case of *Church v. Brown* (g), Lord *Eldon*, after great consideration, upheld Lord *Thurlow's* decision in *Henderson v. Hay* ; and decided, that it made no difference whether the agreement declared that the lease contracted for was to contain the usual and proper covenants or not,—that, in every agreement, whether as to freehold or leasehold estate, it was implied that there were to be usual and proper covenants,—that both lessor and lessee would be entitled to such covenants as

(a) See Co. Litt. 56. a., 163. a ; 3 Com. Dig. 85, ed. 5 ; 3 Burge Com. 416.

(b) 1 Saund. 320, and notes. (c) 1 T. R. 560. (d) 3 Bro. C. C. 632.

(e) 15 Vcs. 258. (f) 1 Esp. 8. (g) 3 Anstr. 700.

[1] When any thing is granted, all the means to attain it, and all the fruits and effects of it are granted also. *Babcock v. Western R. R. Co.*, 9 Met. 556. Whatever is essential to the enjoyment of the thing granted passes as an incident. *Cocheco Manuf. Co. v. Whithers*, 10 N. H. R. 305.

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were strictly incidental to the subject of the agreement, and to no others. Speaking of a covenant to sell a fee-simple estate, free from incumbrances, he says—"It is clear that covenant carries in gremio, and in the bosom of it, the right to proper covenants;"—and he explains the reason to be, that, at all times, such covenants have been carried into execution in a particular manner; and he afterwards extends the reasoning to other cases upon the same principle. In case of an agreement for a lease, with a stipulation that the lessee should keep the premises in repair, a right of entry was uniformly reserved to the landlord, as a right incidental to the interest reserved to him by the agreement. Covenants become usual and proper covenants only because, by common consent, they are found essential to perfect the contract between the parties.

To apply this reasoning to the present case,—it is proved in evidence that where coal-mines are either let or sold at a royalty, with stipulations as to the manner of working the [*182] mines, a right of entry to view the mines is reserved to the lessors, for the twofold purpose of seeing,—first, in what manner the mines are worked; and, secondly, the quantity of minerals obtained. A covenant or proviso for this purpose is admitted to be incidental to the contract for such a lease or sale. The contract, without any express stipulation, would, in Lord *Eldon's* language, carry in gremio, and in the bosom of it, the right of entry, which was necessary to protect the interest of the lessor or vendor. How does the present case differ from that? It differs from it in this respect only, that the lessor having no interest in the manner of working the mines, but having an interest in the quantity of minerals worked, a question may arise, whether the right of entry to which he would be entitled, if his interest extended to both, must not be reduced to such right of entry as will suffice to protect the single interest which he has; but his right to the incidental covenants as to that interest must remain. In the absence of any evidence, but that to which I have referred, and which the answer of Mr. *Whieldon* confesses, I should think that the conclusion I have stated was irresistible.

The case does not, however, rest upon any conclusion merely so

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derived. The issue distinctly tendered in the cause by the Plaintiff was, that the power of inspection was an usual reservation in cases like the present. Witnesses have been examined on this point by both parties, and the evidence of the witnesses for the Plaintiff,—scarcely more forcible than that of the Defendant's witnesses,—inevitably leads to the same conclusion. In fact, all the evidence proves it. There must, therefore, be a decree for a specific performance of the agreement, giving the Plaintiff such a power [*183] of entry and inspection as will enable him to protect his interest in the property, but not extending beyond what may be necessary for that purpose.

MINUTE OF DECREE.—The agreement of the 6th of April, 1838, to be specifically performed. The Defendant admitting that he has accepted the title, and the Plaintiff waiving all claim to interest upon the instalments of purchase money remaining unpaid, refer it to the Master to settle the conveyance for carrying the agreement into effect, in case the parties differ; and, in settling such conveyance, the Master is to insert therein a clause empowering the Plaintiff and his agents, at all reasonable times, and upon reasonable notice, to enter the mines in the pleadings mentioned, and to inspect and measure the same, so far as from time to time may be necessary, for the sole purpose of ascertaining whether the quantity of minerals, which should or may be gotten or worked in each year, has exceeded, and how much, if anything, an acre, until the whole quantity of coal under the said twelve acres shall be gotten or worked, or the whole of the twelve instalments mentioned in the pleadings shall be paid; and, in settling the said conveyance, the Master is to have regard to the clauses usually contained in leases and sales of coal at a royalty. Liberty to the Master to state special circumstances. Costs to be reserved. The parties to be at liberty to apply.

[*184]

*DUNCOMBE v. DAVIS.

1841: November 24, 25.

A party having deposited with his bankers an annuity deed, together with other instruments, as security for the balance of his banking account, cannot, by his answer to a bill seeking to have the annuity deed cancelled, and the other securities first applied in satisfaction of the bankers' claim, protect himself from answering as to such other securities, by alleging that they are his own title-deeds, in which the Plaintiff has no interest.

Where an answer is reported sufficient, and the bill is amended, the Plaintiff cannot

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again sustain exceptions on the old matters.[1] If the further answer is referred on new exceptions relating to the old matters, the Defendant may object that the answer in such respects must be deemed sufficient; and it is not necessary that he should move to discharge the order of reference.

There is no exception to the rule, where the amendments consist of particular charges and interrogatories, which were included in a general charge in the original bill, or of a prayer for specific relief included in the general prayer.

Whether there is an exception to the rule, where a new case is made by the amended bill—*quere.*

The Court will, in a proper case, entertain a special application to refer an answer to the Master to consider its sufficiency, without regard to the fact, that, by amending the Plaintiff has, in form, admitted it to be sufficient.

THE bill stated, that the Plaintiff had been fraudulently induced to execute a deed, dated the 6th of December, 1834, granting an annuity to *Pennell*, charged upon certain premises; that *Pennell*, on the 27th of March, 1835, assigned the annuity to *Davis*, who had notice of the fraud; and that *Davis* had deposited the deed and assignment, and other securities also, with Sir *S. Scott* and *S. Scott*, his bankers, as a security for the balance due to them on his account: and it prayed, that the deed might be delivered up to be cancelled, and that the premises charged with the annuity might be reconveyed to the Plaintiff.

The original bill contained the following charges and interrogatories, excepting the passages in italics, which were afterwards added by amendment:—

‘And your orator charges, that, whether the said Sir *S. Scott* and *S. Scott* are not in advance to the said *P. Davis* upon the said deposit, and whether they had or not such notice as aforesaid, yet they have in their hands or possession other securities [of

[1] If the bill has been amended, the complainant may deliver new Exceptions applying to any part of the amendments which he does not think sufficiently answered. But such new Exceptions must not extend to any matter which was contained in the original Bill. *Partridge v. Haycroft*, 11 Vesey, 570. 1 Barb. Ch. Pr. 197.—Where a complainant neglects to except to the answer to his original bill or where Exceptions have been overruled, he cannot except to the answer to his amended bill on the ground that the original bill was not fully answered. *Chasournes v. Mills*, 2 Barb. Ch. R. 466. *Ovry v. Leighton*, 3 Sim. & Sta. R. 224.

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[*185] *"considerable value and amount"* from the said *P. Davis*, and other deeds and documents [*of and*] by way of security from the said *P. Davis*, besides the said indenture of the 6th day of December, 1834, and the said assignment of the 27th day of March, 1835, as security for, and applicable to the discharge of, and more than sufficient to pay and discharge what may be due from the said *P. Davis* to them the said Sir *S. Scott* and *S. Scott* upon the said deposit mentioned in their said notice to your orator, and which ought first to be applied for the purpose of paying and discharging the same ; [*and the said P. Davis and Sir S. Scott and S. Scott ought to set forth a list and short description of all such other securities and deeds and documents, and the amounts and values thereof respectively ; and particularly as*] your orator charges, that if the said annuity is not void, but only voidable, and the said Sir *S. Scott* and *S. Scott* are entitled, as against your orator, to hold the said annuity or the said indenture of the 6th day of December, 1834, as security for any money advanced by them thereon, your orator is entitled, and is ready and willing, and offers to pay to the said Sir *S. Scott* and *S. Scott* what they may have so [*advanced upon having all securities held by them for the same transferred to your orator*] ; and thereupon the said annuity ought to be set aside as between your orator and the other Defendants hereto claiming to be interested therein.

And whether the said Sir *S. Scott* and *S. Scott*, or one and which of them, have not or has not in their or his hands or power some and what other securities, and other deeds and documents by way of security, from the said *P. Davis*, besides the said indenture of the 6th day of December, 1834, and the said assignment of the 27th day of march, 1835, as security for, and whether [*186] or not applicable to the payment or discharge of, *and whether or not more than sufficient to pay and discharge, what may be due from the said *P. Davis* to them the said Sir *S. Scott* and *S. Scott* upon the said deposit mentioned in their said

* The passage in *italics*, and which are also placed within brackets, were introduced by amendment after the first answer.

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notice to your orator ; [*and that the said Defendants, P. Davis and Sir S. Scott and S. Scott, respectively may, in manner aforesaid, set forth a list and short description of all such other securities, deeds, and documents, and the amounts and values thereof respectively*].’

P. Davis, in his answer to the original bill, in reference to the foregoing interrogatory, as it stood before the amendment, said—

‘The said Defendants, *Sir S. Scott and S. Scott*, have in their hands or power certain other securities and other deeds or documents by way of security from this Defendant, besides the said indenture of the 6th day of December, 1834, and the said assignment of the 27th day of March, 1836, as security for and applicable to the payment or discharge of, and, as this Defendant believes, more than sufficient to pay and discharge what may be due from this Defendant to them upon the said deposit ; the particulars of which other documents, however, this Defendant submits that he ought not in this suit to be called on to discover or produce, more particularly as the same relate to property which this Defendant is entitled to or interested in, and in which the said Plaintiff has not any manner of interest, and constitute the title of this Defendant to such property.’

To this answer the Plaintiff excepted ; and the Master disallowed the exception. . The bill was then amended, and the passages distinguished in the above extract by italics were added ; and also the following prayer :—

“ And that, if it shall appear that the said *Sir S. Scott* [*187] and *S. Scott* are entitled, as against the Plaintiff, to any charge upon the said annuity or the said indenture of the 6th of December, 1834, then that the other securities from the said *P. Davis*, which the said *Sir S. Scott and S. Scott* hold for the same charge, may be applied in discharge thereof, or that Plaintiff may be at liberty to pay off to the said *Sir S. Scott and S. Scott* such charge ; and that they may be ordered thereupon to transfer and

 1841.—*Duncombe v. Davis.*

deliver to the Plaintiff all securities from the said *P. Davis*, which they hold for the same, including such indenture ; Plaintiff hereby offering so to pay off the said Sir *S. Scott* and *S. Scott*, if necessary or proper.'

The Defendant *Davis*, answered the amended bill, but made no further answer to the foregoing interrogatory ; and the Plaintiff then took an exception on the amended interrogatory. The Master disallowed the exception ; and the cause came on upon exception to the Master's report.

Mr. *Temple* and *E. Montagu*, for the Plaintiff, in support of the exception to the report.

Mr. *Spurrier*, for the Defendant.

The answer must be deemed sufficient on several grounds :—First, the sufficiency of the answer is conclusively decided by the finding of the Master on the first exception, and by that finding having been submitted to ; secondly, the question relates to title-deeds and securities, which are exclusively the property of the Defendant, and in which the Plaintiff has no interest ; and, thirdly, the discovery sought is immaterial to any relief which can be had upon the case made by the Plaintiff in this suit ; and, lastly, if any relief [*188] could be had to which these documents could be material, that relief would be merely consequential upon circumstances which do not at present appear ; and it is, therefore, too remote to be a matter of inquiry in this stage of the cause.

VICE-CHANCELLOR :—

I do not think it necessary to call upon the Plaintiff's counsel for a reply in this case, except upon the question of form, namely, whether the submission of the Plaintiff to the Master's judgment upon the old exceptions has concluded him. The only part of the

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Plaintiff's case that is material to the present question is,—that the annuity deed, which is impeached by the bill, is held by the Defendants, Sir *S. Scott* and *S. Scott*, as a security for the balance of the banking account of the Defendant, *Davis*, with them. The Plaintiff insists, that, as against *Davis*, he is entitled to have the deed cancelled, and that he is entitled to the same relief as against the bankers; but if the bankers should be in a better situation than *Davis*, and should have a right to stand as mortgagees of the annuity deed, yet that they hold other securities sufficient to satisfy their debt; and that such other securities, in which the Plaintiff has no direct interest, ought first to be applied to that purpose. This is a common equity; and if relief on this ground is prayed, I am bound to hold that, in this stage of the cause, all material discovery must be given.

In answer to this, it is said that *Davis* is the owner of the securities in question, and is in the situation of a purchaser for value, without notice. If *Davis* is a purchaser for value of the annuity deed, the Plaintiff probably will get no relief at the hearing as to the other securities held by the bankers. But [*189] that is no reason why the Defendant should not now tell the Plaintiff what those other securities are, unless the state of the pleadings is such that the Defendant, in point of practice, can refuse to give that discovery. With regard to these securities, the very case of the Plaintiff is, that they are actually the property of the Defendant, *Davis*, and that they ought to be first applied in discharge of the debt of *Davis*. That is the question to be decided at the hearing; and the Plaintiff must, in some stage of the cause, if he is entitled to the relief he prays, inform the Court what those other securities are.

It was then said, that the deeds, with respect to which discovery was asked, related exclusively to the title of the Defendant, and that that was to get rid of the Plaintiff's present application. But the answer to this argument is obvious. The Defendant, not having met the case by plea or demurrer, has submitted, upon the question

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of the sufficiency or insufficiency of his answer, to have the case considered as one in which he is bound to give all discovery by his answer, which may be material to the relief prayed by the bill. Having submitted to answer the bill, he must answer it fully, unless he can shew that any particular interrogatory is in itself improper. He cannot refuse to answer only because he disputes the Plaintiff's right to the relief he asks. If that were not the rule, the Court would be under the necessity of hearing the cause upon the merits to determine the mere question which is raised by exceptions to the answer. Now, there are, no doubt, cases in which the allegation that deeds relate exclusively to the title of the defendant, and not to that of the plaintiff, is a defence to discovery; but if such an allegation, wherever a defendant thought proper to introduce it, were to constitute a defence, upon *exceptions to the answer, there would be a few cases in which documents would be obtained by means of the answer. Take, for example, the case of a bill filed to redeem an estate, charging that the defendant is a mortgagee of the property, where the case of the defendant is, that he is absolute owner; and suppose, in such a case, the plaintiff to allege that the defendant is in possession of a deed of a certain date or description, wherein there is a proviso for redemption of the very property in question: the defendant might deny that he had any such deed in his possession; or admitting that he had a deed of that date or description, he might deny that it contained the alleged clause for redemption. In the former case, the Court could not, of course, order the production of that which was not admitted to exist; and, in the latter case, in the simple state of things which I have suggested, the charge would, perhaps, be sufficiently answered, and there would then be ground for the defendant to go upon, in insisting that the deed was the evidence of his own title, and not of the title of the plaintiff: but, without meeting the charge in the bill, either by denying the existence or possession of the deed, or would not be sufficient for the defendant to allege merely that the deed was his title-deed. That is the same, substantially, as an attempt to meet a particular charge by a general answer. The Defendant must allege

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matters which may enable the Court to judge whether the excuse he makes for not answering the particular question in the bill is sufficient or not. It is not necessary I should express any opinion upon the extent of the answer which the Defendant should make ; but unless he is protected on the ground of form, he must answer as to these documents, so far, at the least, as to say what they are.

*Mr. *Temple* replied, on the question of form only. [*191]

The exception must be considered without reference to the circumstance, that a part of the interrogatory was contained in the original bill, and that the Master's decision overruling the exception was submitted to ; for, first, the question of practice is concluded by the order referring the answer on the new exception. If the sufficiency of the answer depended on the state of the record before amendment, the reference should have been made on the old exception. The Master had no discretion upon this order ; he was bound to consider the sufficiency upon the amended record ; and if the Defendant objected to that course, he should have moved to discharge the order of reference. Secondly, there is a new case made upon the amended bill ; and the sufficiency of the answer upon the old case is unimportant : *Mazarredo v. Maitland* (a). The question of insufficiency is therefore open.

VICE-CHANCELLOR :—

The Plaintiff in this cause filed his original bill, which contained a charge that the Defendants, Sir *S. Scott* and *S. Scott*, held other securities of the Defendant, *Davis*, in addition to the deed in question, applicable to the payment of what was due to them from him ; and it contained an interrogatory founded upon that charge. The Defendant, by his answer, insisted, that he was not bound to discover the particulars of such other documents. The Plaintiff

(a) 3 Madd. 66.

 1841.—*Duncombe v. Clark*.

excepted to this answer,—the exception was overruled, and he submitted to the Master's decision, and amended his [*192] bill "by adding to the charge of the possession of other securities the allegation, that they were "of considerable amount and value," and that the Defendant "ought to set forth a list and short description of them, and of their amount and value." I have not the least doubt of the practice, in cases in which the Plaintiff has amended his bill after answer, and has then excepted to the answer to the amended bill, upon interrogatories contained in the original bill. By amending his bill, after answer, the Plaintiff admits the answer to have been sufficient; and he cannot afterwards except to matters which he had not excepted to upon the answer to the original bill. There are some special exceptions to the rule; as, for example, where the amendment extends only to the correction of a name, or the addition of a party, not affecting the Defendant, whose answer is in question. It was strongly insisted in argument, that this was not the practice: it was said, that the Court having made an order referring the exceptions, the Master was bound to consider them with respect to the amended record, and was not to look at the original record. Being anxious that there should be no difference of practice in the Courts, I have referred to the authorities. In the case of *Ovey v. Leighton* (a), the very point was directly before the Court: it does not seem to have been much argued; but Sir *J. Leach* held, that the Master was right in having regard to what had before taken place in the cause. The next case is *Glassington v. Thwaites* (b). That was, in its circumstances, a very special case. The Defendant, when called upon to answer the original bill, put in what was called "an answer and disclaimer," which was, in fact, a disclaimer of his own liability. [*193] The Plaintiff did not except, but amended his bill; "and to the amended bill, the Defendant repeated his answer and disclaimer. The Plaintiff then took exceptions, which were referred by the common order. The Master, without reporting whether the answer was sufficient or insufficient, gave a certificate

(a) 2 Sim. & Stu. 234.

(b) 2 Russ. 458.

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stating the material proceedings in the cause as to that Defendant. After some other ineffectual steps in the cause, Lord *Eldon* ultimately made a special order, referring it to the Master to consider the exceptions, as if the matters to which they related had not been contained in the original bill. The very form of the order shews that, without these special directions, the original answer must have been taken to have been sufficient (a).

It was said, however, that a new case was made on the amended bill; and *Mazaredo v. Maitland* (b) was relied upon, as shewing that the rule I have referred to did not then apply. Mr. *Daniell* (c) has collected all the cases on this point, and commented upon them in an able manner. In *Mazaredo v. Maitland*, Sir *John Leach* held, that the Defendant was bound to answer all the interrogatories, notwithstanding there had been a former answer to some of them. *Mazaredo v. Maitland* may perhaps be explained on this principle,—that new matters being introduced by amendment, all the interrogatories, with regard to the circumstances attending them, and the evidence by which they were proved, had a different and larger meaning in the amended than in the original bill; as in the common case, where the charge of the possession of the documents “relating to the matters aforesaid” requires to be answered again, if there is any new matter introduced in the amended bill. The language which Sir *J. Leach* is reported to have *used, may certainly be [*194] understood as going farther; but the exceptions which were the subject of that case may, for any thing which appears, have been determined upon this principle.

I think, however that the Plaintiff has not made a new case by amendment, so as to bring himself within any exception which might exist on that ground. The distinction said to exist between the two bills is first, the difference in the charges, and, secondly, in the prayer. The amended bill prays specific relief as to these securities to which the interrogatory applies; whereas the original bill prayed no specific relief with regard to them. The alteration in the charge clearly cannot

(a) His Honor also mentioned the case of *Irving v. Viana*, M'Clel. & Y. 563.

(b) 3 Madd. 66.

(c) Chan. Pract., Vol. II, p. 302.

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make any difference. The Plaintiff in the original bill called upon the Defendant to set forth whether any such documents existed. The Defendant, by his original answer, refused to give the particulars which were asked for, with regard to them. The amended bill requires the Defendant to set forth circumstances relating to documents, which, by the proceedings in the original bill, the Plaintiff has admitted that the Defendant is not bound to discover or produce. If that were enforced, the rule which I have referred to would be a nullity ; for the Plaintiff might escape from it, by the addition of an interrogatory as to some minute circumstance. The first question, of " what securities ; " includes within it, for the present purpose, all the component facts of description, amount, and value. Nor does the prayer for specific relief, introduced in the amended bill, make any difference. The original bill alleged, that the deed in question was invalid as between *Davis* and the Plaintiff, and also as between the Plaintiff and the bankers ; but, inasmuch as a different case might exist in respect to the latter, it charged that, if the deed were

['195] valid as between the Plaintiff and the bankers, the bankers ought first to apply to the payment of their debt those securities which they hold, in which the Plaintiff has no interest. The Court must, at the hearing, decree that to be done, if the law entitles the Plaintiff to have it done, which I have not at present to decide ; it is sufficient for this purpose to say, that, if this particular relief can be given, it might be given under the prayer for general relief, upon the circumstances which are alleged in the original bill ; and, therefore the specific prayer in the amended bill makes no difference between the two records for the present purpose.

Though the Plaintiff may not be able to get from *Davis* a discovery of the documents which the bankers hold, he may nevertheless succeed in proving at the hearing, or in an inquiry, what those documents are ; and supposing it should appear, that, though the deed is void as against *Davis*, the bankers have a right to hold it, yet, seeing that they have two securities, the Court may say that they shall first apply, in payment of their debt, that security in which the Plaintiff has no in-

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terest, in order to liberate the annuity deed. No injustice will ultimately follow from my present decision.

I am not called upon to say whether the Plaintiff might, on a special application, have the matter, of this exception referred back to the Master. The Court has, no doubt, entertained special applications in cases where an objection of form only has interposed, and precluded a Plaintiff from obtaining a discovery to which he is substantially entitled.

*SALKELD v. JOHNSTON.

['196]

1842: November 6. 10. February 8.

The statute 2 & 3 Will. 4, c. 100, brings down the period of legal memory from the time of 1 Ric. 1 to the time of the commencement of two incumbencies, (not being together less than sixty years), and three years of a third incumbency; but does not create a new ground of exemption, or destroy the right to tithes upon mere proof of non-payment or non-render during two such incumbencies, and three years of a third, in cases where proof of non-payment or non-render from the time of 1 Ric. 1 would, before the statute 2 & 3 Will. 4, c. 100, have established no exemption. [1]

The proof of the title of the vicar to some small tithes, and that the other small tithes had never been paid to the rector, is not necessarily sufficient to establish the right of the vicar to such other small tithes, especially where some of the evidence is opposed to the vicar's claim.

Where, in a suit for small tithes, by the vicar, against occupiers, the rector is a defendant and disclaims, the Court may use the disclaimer for the purpose of founding upon it a decree for the particular tithes demanded by the plaintiff in the suit, but not for the purpose of proving the right of the vicar to such tithes.

THE Bill was filed, on the 9th of November, 1833, by the vicar of the parish of *Crosby-upon-Eden*, in the county of *Cumberland*, against the Defendants, who were occupiers of land within the parish; and it prayed, that an account might be taken of the tithes of "turnips, potatoes, cabbages, tares, grass, clover, rye-grass, sainfoin, and other artificial grasses not made into hay, but used as and for green fodder, or carried off the land in a green state, and other

[1] See *Clayton v. Meadows*. vol. 2. p 26.

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green crops yearly arising within the parish;" and it also prayed an account of the tithes of agistment (a).

The *Bishop of Carlisle*, who is rector of the parish of *Crosby-upon-Eden*, was also a Defendant, and disclaimed all title to the tithes in question.

[*197] "The Defendants, the occupiers, by their answer, claimed no special ground of legal exemption from the payment of tithes in kind; but said, they believed that the right and title to the tithes of all the several titheable matters and things, was and had always been vested in the rector for the time being of the parish, save and except so far as the same had, as the Defendants believed, been barred by a certain act of Parliament passed in the second and third years of his Majesty King William the Fourth (b), intituled "An Act for shortening the time required in claims of modus decimandi, or exemption from or discharge of tithes." And the Defendants said they believed that the lands thereafter mentioned to have been in their respective occupations had been respectively enjoyed without payment or render of any tithes of the said titheable matters and things, or any of them, or money or other matter in lieu thereof, or any of them, to the vicar of the parish for and during the whole time; that two persons in succession had held the vicarage, and for not less than three years after the institution of a third person thereto, and during such number of years as were sufficient to make up the full period of sixty years, and also the further period of three years after the institution of a third person to the vicarage.

The successive incumbencies of the vicarage, during the period

(a) A question was made in argument, of whether the bill should be read as claiming the tithes in question as parcel of an endowment of all the small tithes arising within the parish, or as claiming the tithes in question, without insisting upon the endowment of the vicarage with all small tithes. The Court held, that upon the language of the bill, the Plaintiff was entitled to have it read as founding his title to the tithes in question as part of a general endowment of all the small tithes.

(b) C. 100.

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to which reference was made, were as follows:—*Gibson*, vicar, from the 10th of August, 1730, after the death of the preceding incumbent. *Shaw*, who succeeded *Gibson*, on the 25th of February, 1758. Dr. *Lowry*, who succeeded *Shaw*, on the 18th of July, 1791: and the Plaintiff, who succeeded Dr. *Lowry*, on the 28th of January, 1833.

*The Defendants, the occupiers, to raise the question [*198] of right, entered into admissions of the production upon and from off their respective lands, or the lands of some of them, of every of the titheable matters and things of which the tithes were claimed by the bill, and that cattle had been agisted by the Defendants or some of them.

Evidence, both oral and documentary, was adduced. It was proved, that the rector, for the time being, or his lessee, had received the tithes of corn and grain, but that, so far as the evidence went, the rector had never received or claimed tithes of any of the titheable matters in question in the suit. It was also proved, that the vicar, for the time being, had received the tithes of some titheable matters and things arising within the parish, different from, and not including the titheable matters of which the tithes were claimed by the bill. It did not appear that tithes of the titheable matters in respect of which they were claimed in the suit, had ever been paid to any person.

Mr. *Simpkinson* and Mr. *Purvis*, for the Plaintiff.

The title of the vicar to the tithes in question (independently of the statute 2 & 3 Will. 4, c. 100) is established, first, by the proof that he has always received some other small tithes; for from that fact his title to these small tithes must be inferred: *Cartwright v. Bailey* (a); *Jeremy v. Strangeways* (b); *Kennicott v. Watson*

(a) 3 Gwill. 938.

(b) 3 Gwill. 1173.

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(a); *Byam v. Booth* (b); *Willis v. Farrer* (c); *Masters v. Fletcher* (d); *Jackson v. Woodroffe* (e); *Manby v. Curtis* (f); *Eagle on Tithes* (g).

[*199] *Secondly, the title of the vicar is supported by the disclaimer of the rector upon the record, which shews that the tithes in question must of necessity be due to the vicar: *Leathes v. Newitt* (h); *Williams v. Jones* (i).

The case is taken out of the operation of the statute 2 & 3 Will. 4, c. 100, if that statute had in other respects any application, by the fact that the bill was filed before the expiration of the first three years of the incumbency of the Plaintiff.

The arguments, with reference to the construction of the statute 2 & 3 Will. 4, c. 100, appear in the judgment.

Mr. *Boteler* and Mr. *Eagle*, for the Defendants, the occupiers, relied on the words of the statute 2 & 3 Will. 4, c. 100, as enacting that the claim to exemption, under the circumstances, like the present, should be deemed good and valid in law; and argued, that a construction which should confine the operation of the act to cases where a legal capacity of exemption was shewn aliunde would in a great measure render it nugatory. They mentioned the case of *Fellowes v. Clay* (k), an issue under the Tithe Commutation Act, on the question of a composition real, which had been argued, on a motion for a new trial, before the Court of Queen's Bench, but on which judgment had not been pronounced.

The time specified by the statute had been comprised in the two incumbencies of *Gibson* and *Shaw*, and three years of Dr. *Lowry*.

It would be an absurd construction to suppose that every
[*200] new incumbent would have *a further period of three years within which to make his claim.

(a) 2 Ea. & You. 690.

(b) 3 Ea. & You. 716.

(c) 2 You. & Jer. 217.

(d) Younge, 35.

(e) 3 Ea. & You. 1302.

(f) Id. 733.

(g) Vol. i. pp. 122, 127.

(h) 3 Ea. & You. 848.

(i) Younge, 252.

(k) Not reported.

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On the other points, they cited *Cunliffe v. Taylor* (a), and the Canons of 1200, 1250, and 1305 (b). The tithes claimed were predial, whilst those which had been received by the vicar were all of a mixed nature. The perception of a few of the small tithes did not prove a title to the remainder (c); and the answer of one Defendant, the contents of which are unknown to the other until the hearing, could not be read against him.

VICE-CHANCELLOR:—

I had deferred my judgment in this case, in consequence of the suggestion that there was now a motion for a new trial depending before the Court of Queen's Bench, the decision upon which would be an authority for the determination of the principal question in this cause. It would have been very satisfactory to me to have had the high authority of that Court for my guidance. I have, however, ascertained that the facts of that case differ so materially from those now before me, that I should be bound to come to my present decision in this case, whatever might be the judgment of the Court of Queen's Bench in the case referred to.

[His Honor stated the conclusions he had derived from the evidence, with regard to the facts, and which conclusions were to the effect above stated (d)]

*The tithes claimed in this suit have not, in fact, been [*201] paid to any one. Those tithes, however, must, upon the pleadings in this cause, be taken to have been at all times due to some one, unless the statute, which is relied upon, has destroyed the right; and the conclusion, therefore, is, that the lawful owner of those tithes, whoever he may be, has merely neglected to enforce his rights.

(a) 3 Ea. & You. 743.

(b) See 4 Ea. & You. 317, 321, 323.

(c) The cases cited in support of the contrary proposition are considered, *infra*, pp. 213, 214.

(d) It has not been thought useful or material to the report on the principal questions, to state the evidence more particularly.

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The questions, then, are, whether the tithes demanded in this cause are now payable? and, if they are now payable, whether they should be rendered to the Plaintiff in this suit?

The Defendants, against whom an account of tithes is prayed, are laymen; and their answer to the vicar's claim for the tithes of the matters in question is founded merely upon the non-payment of those particular titheable matters during two successive incumbencies, (being together of not less than sixty years' duration), and more than three years after the induction of a third incumbent. The claim of exemption is founded on non-payment of the tithes in question, and upon non-payment only. No attempt has been made to shew such a title to the lands, which the Defendants occupy, as prior to the statute of the 2 & 3 Will. 4, c. 100, commonly called Lord *Tenterden's* Act, might, in conjunction with non-payment of tithes in modern times, have established a case of legal exemption. The Defendants insist, that, according to the true construction of that act, non-payment of tithes during two such successive incumbencies as the act requires, and more than three years after the induction of a third incumbent, will alone constitute a bar to the vicar's claim. The vicar, on the other hand, insists, that the statute, properly expounded, has not introduced any such rule of law as the Defendants contend *for; and the true construction of the act is the first question to which my attention must be directed.

In order to a right solution of this question, it will be convenient to begin by adverting to the state of the law respecting legal exemption of lands from the payment of tithes before and at the time when Lord *Tenterden's* Act was passed.

Prior to that act, all lands in the hands of laymen were *prima facie* liable to the payment of tithes. And evidence shewing the enjoyment of lands, without payment or render of tithes for a period commencing before the time of legal memory, was no answer, by a layman, to the demands of a rector or vicar; a principle which was commonly expressed, by saying that laymen could not prescribe in *non decimando*. “Mere non-payment of tithes (says Sir *Samuel*

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Toller (a),) although from time immemorial, does not amount to a discharge, without shewing some special ground of exemption. *Evidence of length of possession*, in such a case, a Court can pay no regard to; for the possession must have been unlawful, and, therefore, there must be a decree in favour of the common right (b).” But notwithstanding this general rule, there were certain cases in which a layman might effectually insist upon his lands being exempt from payment of tithes. The ground of such exemption, however, could only be found in the title of the lands in respect of which the exemption was claimed. The title which carried this privilege with it, was a title to lands proved to have been formerly parcel of the possessions of one of the greater monasteries at the time of their dissolution. In order, however, that such claim of exemption might be legally established, “two things were requisite—1st, that [*203] the lands should have belonged to one of the greater monasteries; and, 2ndly, that the lands should have been holden by the monastery discharged of the payment of tithes at the time of the dissolution (c). Proof of the former of the above requisites (namely, that the lands, in respect of which the exemption was claimed, had formerly belonged to one of the greater monasteries) carried with it a capacity in the lands for exemption from payment of tithes in kind; but did not necessarily prove it. Proof of the latter (viz. that the lands were holden by the monastery discharged of the payment of tithes at the time of the dissolution) was indispensably necessary to convert the mere capacity for exemption (which proof of the former fact established) into an actual right of exemption.

In practice, the course which the trial took in cases in which exemption from payment of tithes was claimed, was this :—The party claiming the exemption began, 1st, by deducing his title to the lands in respect of which the exemption was claimed under one of the greater monasteries; and, 2ndly, having, by this proof, established a capacity for exemption in the lands, he proceeded to prove that

(a) *Toll. on Tithes*, p. 166, ed. 2.(b) See cases *Id.* 164 et seq.(c) Stat. 31 H. 8, c. 13: *Clavell v. Orm*, 3 Gwill. 1284; *Toll. on Tithes*, 174, ed. 2.

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they were held by the monastery discharged of tithes at the time of the dissolution. This latter proof was given in practice, by shewing a usage of non decimando in modern times, from which, when unopposed, or not effectually controverted by evidence of a contrary usage in earlier times,* the Court was called upon to infer that the lands had been held exempt from tithe at the time of the dissolution of the monastery to which they were proved to have belonged. [*204] But, in such cases, the Court, or a jury, had often to determine between the weight of modern usage and evidence of older date, in deciding whether the usage was sufficient to justify the presumption, that the lands had been held by the monastery discharged of tithes at the time of the dissolution. The state of the law then, before, and at the time of passing Lord *Tenterden's* Act, was this—that, with respect to lands in the hands of a layman, not proved to have belonged to one of the greater monasteries, evidence shewing the enjoyment of the lands, without payment or render of tithes for any length of time, was immaterial, and evidence of the fact was neither required nor admissible; and, in suits for the recovery of tithes with respect to the lands proved to have belonged to one of the greater monasteries, (and having on that account a capacity for exemption), proof of the enjoyment of lands exempt from the payment or render of tithes in modern times, though carried back for centuries, might be countervailed by the production of a terrier, survey, valuation, account or other evidence of more ancient date. No time of definite duration was fixed by law which should carry with it a title to exemption, in spite of more ancient evidence to the contrary. In this state of the law, Lord *Tenterden's* Act was passed; the act is as follows:—"Whereas the expense and inconvenience of suits instituted for the recovery of tithes may and ought to be prevented, by shortening the time required for the valid establishment of claims of a modus decimandi, or exemption from or discharge of tithes."—The act then provides, in effect, that where a claim for the render of tithes in kind shall be made by any lay person, a claim of exemption or discharge of tithes shall be sustained, and deemed good and valid in law, upon evidence proving the enjoyment of the lands, without payment or

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render of tithes, money, or other matter in lieu *there- [*205]
 of, for thirty years next before the time of demand, unless proof is given of the payment of tithes in kind prior to the thirty years; and if the proof of the enjoyment of the land, without such payment or render as aforesaid, be carried back for sixty years, the exemption becomes absolute, it is proved that the enjoyment was had by some consent or agreement expressly made or given for that purpose by deed or writing. And where the render of tithes in kind shall be demanded by any corporation sole, spiritual or temporal, then the claim of exemption or discharge shall be valid and indefeasible, upon evidence of such enjoyment, during the incumbency of the benefice by two persons in succession, (if not less than sixty years,) and for not less than three years after the institution of the third, unless the enjoyment should be proved to be had under such consent or agreement.

Now upon this act, the vicar insists, that it merely applies to cases in which, before the act, an exemption might lawfully have been pleaded. He insists, that the case of every occupier of land claiming exemption before the statute, consisted generally of two distinct parts,—one relating to the title to his lands, the other to non-payment in respect of those lands; and that the statute applies to this latter part only, and leaves the occupier under the same obligations as before the statute to prove the former. The Defendants insist, on the other hand, that the act is general in its operation, and that a prescription in non decimando, may now be pleaded by any layman against a claimant of tithes, without reference to the title of the lands, in respect of which the exemption is claimed. To this latter construction of the act I cannot accede.

What was the cause of the expense and inconvenience, *which, according to the preamble of the act, it [*206] was the object of the legislature to prevent? This is clearly answered by the language of the preamble itself. The cause was the length of time required for the valid establishment of claims of a *modus decimandi*, or exemption from or discharge of tithes.

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What were the cases in which the expense and inconvenience were incurred? Not certainly cases in which no legal claims of exemption from payment of tithes might be made; for except in cases in which the title to the lands was deduced from one of the greater monasteries, the enjoyment of the lands, without payment or render of tithes, for any length of time, was wholly immaterial; and neither expense nor inconvenience was or could be incurred in such cases. The proposition suggested by the preamble of the act, is not that expense and inconvenience are to be prevented, by making time material, in cases in which, before the passing of the act, it was immaterial; but that the time theretofore *required*, by courts of law, for the *valid* establishment of exemption from or discharge of tithes, should be shortened. How can this language apply to cases in which proof for any length of time was not theretofore required,—which the law itself, before the statute, excluded from the operation of that inconvenience and expense which the statute was intended to prevent?

If the preamble of the act is a legitimate test for determining what the cases were to which the act was intended to apply, it is impossible to say that the act can have been intended to apply to cases into which the time, which the act proposes to shorten, never entered, and in which, for that reason, there was no time to shorten. It may be true, that the proof of title to lands, under one of the greater monasteries, may itself be both expensive and inconvenient; but it is not that part of the "occupier's case, nor the expense and inconvenience occasioned thereby, that the act proposes to deal with. It is with time, and with time only, that the statute has to do.

Bearing in mind, then, that, at the time of the passing of the act two classes of cases existed; to one of which the preamble had no application; but to the other of which it had a direct application; in one of which class of cases the expense and inconvenience pointed at by the act did not, and could not, occur; in the other of which that inconvenience and expense did occur; in one of which there

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was no required time to shorten ; in the other of which a law limiting the time required for the valid establishment of claims of a *modus decimandi* was much called for ; can that be a reasonable construction of an act of Parliament professing only to remedy an inconvenience *in the mode of proving* existing rights, which should make the act introduce an entirely new ground of exemption,—and that a prescription in non decimando theretofore repudiated by the law,—and thus, by a side wind, sweep from the church a material part of its revenues, the claims to which never occasioned the mischiefs which the act proposes to remove ?

I must here observe, that, in the construction I put upon the act, I do not in any way restrain the operation of its enacting clauses in their application to cases within the act ; I use the preamble only for the purpose of ascertaining what the cases are to which the act was intended to apply. This is a strictly legitimate process for interpreting an act of Parliament: *Emanuel v. Constable* (a) ; *Foster v. Banbury* (b). Indeed, courts of law [*208] have held, that the mere subject-matter of an act alone, without any preamble, may safely be relied upon for restraining the operation of general words. *In re Bruce* (c) ; *Arnold v. Arnold* (d). So with respect to the stock-jobbing acts. These, in terms, are general, and would apply to transactions in Foreign stocks,—a verbal construction which the courts have rejected in favour of the obvious intention of the legislature to apply them only to British stocks: *Henderson v. Bise* (e) ; *Wells v. Porter* (f) ; *Elsworth v. Cole* (g). Other cases may be cited to the same purpose (h).

The consideration upon which the preceding observations are founded, have been derived entirely from the preamble of the act, and the nature of the subject about which the act is conversant. But the enacting clauses appear to me to lead irresistibly to the

(a) 3 Russ. 436.

(b) 3 Sim. 40.

(c) 3 Crompt. & Jervis, 436.

(d) 2 Myl. & Cr. 256.

(e) Starkie, 158.

(f) 3 Bing. N. S. 722.

(g) 2 Mee. & Well. 31.

(h) See also 3 Rep. 13 b ; Id. ed. 1826. note (U) ; 4 T. R. 1792 ; 4 M. & S. 437 ; 3 B. & Ald. 152 ; 4 B. & Ald. 214 ; 1 B. & C. 562 ; 1 Inst. 79 a ; Id. n. 42 (Hargrave) ; 2 Inst. 308 ; 3 Sim. 41, note (d).

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same conclusion. The act speaks of claims of modus and exemption; can it have been intended that a modus bad upon the face of it, as desultory, uncertain, or otherwise invalid in law before the act, should be made valid by the operation of the act? This question must be answered in the negative; for the act only professes to aid the proof of a modus, and not to make good a modus which, before the act, was invalid. It refers to the modus to be established as something known to the law. The act in effect, describes the sort of modus or exemption it means to aid. It is to be a modus or exemption *by composition real or otherwise*. The composition real is put as an example. The words "*or otherwise*" must [*209] mean other "legal causes. The legislature could not have intended, under those general words, to create new causes for modus or exemption before unknown to the law. Nor is this the only argument to be derived from the enactments of the statute. The modus or exemption by composition real or otherwise (of which the act speaks), is to be sustained, and to be deemed good and valid in law upon evidence of a certain kind described in the act. The modus or exemption, then, is a distinct thing from the evidence which is to sustain it. The act does not say that evidence of non-payment alone shall create, but only that it shall sustain the modus or exemption spoken of. The modus or exemption, therefore, whether by composition real or otherwise, must be pleaded, or there will be no issue which the evidence is to sustain. The 7th section of the act, practically considered, supports this view of the case. I do not understand how a plea could be framed under the 7th section, which could avoid putting the right of exemption upon some known ground.

Such are the considerations which, upon a general view of Lord *Tenterden's* Act, would have led me to the conclusion, that that act should receive the limited construction for which the vicar contends. But when these considerations are applied to a case like that before me, they become irresistible. Tithes in kind of all titheable matters produced from off the Defendants' land, except the tithes in question, are admitted to be payable. If the lands are exempted from the tithes or matters in question, under Lord *Tenterden's* Act, it must

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be upon the ground of a supposed contract for such exemption commencing before time of legal memory. But the titheable matters, which are the subject of this supposed contract, or the greater part of them, were confessedly unknown in this country until long after the *time of legal memory. A modus, indeed, [*210] which is also founded upon a supposed contract before the time of legal memory, may well cover matters of new introduction; for the contract in that case may have been for the general exemption of the lands from payment of tithes of whatever nature, and whether the titheable matters were known or unknown at the time of the supposed contract before the time of legal memory not to pay tithes of titheable matters then unknown, and thereafter to be introduced, would be merely void for want of consideration. Tithes of all titheable matters being originally due, a contract to take part only in satisfaction of the whole cannot satisfy the right to the residue, without an equivalent in value.

It has, indeed, been suggested, that the statute makes no distinction between titheable matters of modern introduction into this country, and other titheable matters. This I admit; but, in constructing an act of Parliament, the same rules of construction must be applied as in the construction of other writings; and if the subject-matter to which an act of Parliament applies be such as to make a given construction of its clauses impossible or irrational, I cannot for a moment doubt the right or the duty of a Court to have regard to such subject-matter as necessarily bearing upon the legal construction of the act. This is invariably done in the construction of wills and deeds, and the same principles are correctly applicable to the construction of an act of Parliament. [1] The only way of escaping

[1] It was a rule of the civil law, That whenever it happened, that the sense of the law was clear, however it might appear in the words, would lead to false consequences, and to decisions that would be unjust, if the law were to be indifferently applied to every thing contained within its expressions; this palpable injustice which would follow from its literal sense, compelled an effort to discard some kind of interpretation, not what the law said, but what it *meant*, and to judge by its meaning how far it ought to be extended, and what the bounds which ought to be set to its sense. Domat, B. I. pt. 1, sec. 2, pl. 7. See also Carthen, 184. *Fisher v. United States*, 2 Cranch, 400. Report of Judge, 7 Mass. R. 528. Smith's Com. 663, s. 517, 518, 519, 520.

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from this difficulty is to suppose the act to apply only to cases in which a general exemption from all tithes in respect of particular lands is claimed, and not to a claim of exemption in respect of particular titheable matters only. That construction of the act will dispose of the present case ; for, in this case, the exemption [*211] claimed is confined to particular titheable matters arising from lands in respect of which no general exemption is claimed ; but I see nothing in the words of the act to warrant such a construction as this ; and if the words of the act are to be modified, by reference to the subject about which it is conversant, I cannot but think this latter construction would be more violent than that which the vicar contends for. The vicar proposes only to confine the act to those cases to which the preamble says it was intended to be applied, and to leave the words of the act in full operation in all such cases. The other construction would be merely arbitrary.

It has been said, indeed, (and if the suggestion were well founded it would be of great force), that, if the construction of the act for which the vicar contends were adopted, the act would have no operation ; for that before the act, the courts of law did not require proof of non-render of tithes for so long a period as is required by the act nor proof of so stringent a kind as that which the act requires. The first branch of this suggestion is clearly founded in mistake. The act has, in several most important particulars, introduced amendments into the law, though its construction be confined in the way contended for by the vicar : for, whereas, before the act, proof of non-payment of tithes for thirty years conferred no presumptive title to exemption, now, under the act, the common-law right of a lay impropriator is taken away, and a *prima facie* title to exemption from tithes is established by such proof. Again, before the act, proof of non-payment of tithes for a hundred years might be destroyed by the production of old surveys, valuations, or other documents ; now, under the act, proof of non-payment of tithes during a period defined by the act, confers (in certain cases) an absolute title to exemption from the payment of tithes. These examples of the effect of the act, under the limited construction [*212] contended for by the vicar, are ample for the present

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purpose. And, if such be the effect of the act, it cannot be matter of surprise that direct and very stringent evidence should be required where such new and important consequences are to follow.

The act of Parliament has, in effect, brought down the year 1 Rich. I. to the commencement of a period of two incumbencies (not being together less than sixty years), and three years of a third incumbency, provided direct and stringent proof can be given, that during this shorter period no tithes in kind have been rendered. Seeing, then, that the preamble of this act is confined to a known and well-defined class of cases, and finding that the act has ample matter to work upon, without extending it to cases not within the purview of the preamble,—is it not more reasonable to ascribe to the legislature an intention only to introduce the important amendments in the law, which, according to the vicar's construction of Lord *Tenterden's* Act, will be introduced by it, than to ascribe to the legislature an intention (by an act, the preamble of which defines its limited object) to introduce indirectly a general right in laymen of prescribing in non decimando?

The reasoning I have applied to a general claim of exemption will apply, *mutatis mutandis*, to a composition real.

Treating the case, then, as unaffected by the statute, the only question which remains is, whether the Plaintiff, upon the evidence now before me, has proved his right to the tithes he claims by the bill. Upon this question, I may, perhaps, consider myself at liberty to use the disclaimer of the rector as it was used in *Leathes v. Newitt* (a), "so far as to give the Plaintiff [*213] the particular tithes which are claimed by this bill. These tithes are clearly due to some person; and the rector, to whom the occupier says they belong, having disclaimed, would not be permitted, in any other proceeding, to claim these particular tithes to the injury of the occupier: *Williams v. Jones* (b). But I cannot

(a) 3 Ea. & You. 848.

(b) *Younge*, 252.

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give effect to the disclaimer, as establishing the right of the vicar to the tithes ; for that would be to read the answer of one Defendant as evidence against a co-defendant. If the Plaintiff had determined to avail himself of the rector's disclaimer, he might have had the benefit of it, by dismissing the bill as against him, and examining him as a witness. It would then have appeared whether the disclaimer proceeded upon the absence of any original title in the rector, or whether the rector had not, perhaps, fallen into the error of supposing that Lord *Tenterden's* Act was a bar to his claim. I must, upon principle, try the question of right, as if the rector were not a party to the record.

Two of the terriers which have been produced, instead of establishing, certainly go far to throw doubt upon the title of the vicar to the tithes in question. Several cases have been adduced with the view of shewing, that, from the evidence which has been given, the Court is bound to conclude in favour of the vicar's right. In *Cartwright v. Bailey* (a), the receipt of all the small tithes by the vicar was taken to be proved, with the exception of clover-seed and rye-grass seed, the titheable matters in dispute ; and these being of modern introduction, the Court said it was not possible they could have been reserved at the time of the appropriation of [*214] the rectory : this supposition being excluded, the inference in favour of the vicar, from his receipt of all the other small tithes, was allowed to prevail. *Jeremy v. Strangeways* (b) was in principle the same. The rector had immemorially received all the small tithes, except the tithe of clover-seed, and the payment of that tithe to the impropiator was referred to the mistaken notion, which had been entertained even in courts of law, that the seed followed the nature of the grass. The judgment of the Chief Baron in *Kennicott v. Watson* (c) is very elaborate ; and it cannot be read without seeing that the opinion of the Court was, that the documentary evidence proved the right of the vicar to all the small tithes arising within the parish, irrespective of perception, and that constant perception of the tithes by the vicar is only re-

(a) 3 Gwill. 938.

(b) 3 Gwill. 1173.

(c) 2 Ea. & You. 690.

1841.—*Salkeld v. Johnston*.

ferred to as supporting the documentary evidence. The tithes of agistment, turnips, and potatoes, are treated as of modern introduction; and the title of the vicar to these tithes is founded upon his title to all other small tithes (a). The question in *Byam v. Booth* (b) turned upon the fact of whether the word "herbagium," used in a grant from the Crown, necessarily meant "agistment." The Court considered the general right of the vicar to the small tithes established. In the case of *Willis v. Farrer* (c), a question arose whether the rector had not in fact received the agistment tithe, which the vicar claimed; and that circumstance prevented the Chief Baron from deciding the point to which his dicta apply; and it distinguishes that case from the present, in which the tithes claimed by the vicar have been received by no one. It is a relief to me, that I am able to avoid the authority of the dicta of the eminent and learned Judge who decided the "case of [*215] *Willis v. Farrer*, by the fact that he offered the vicar an issue, or the dismissal of his bill with costs.

I do not say, that no case can be produced, in which perception by the vicar of all the small tithes which had been paid, as distinguished from all which had been payable, has been considered sufficient evidence of the vicar's title to all the small tithes; but my conclusion from the cases is this—that the Court has professed to find evidence of the general right of the vicar, independently of the inference arising from mere perception of some titheable matters; or the perception has extended to all the small tithes, with the exception of some tithes, the non-receipt of which could be referred to special circumstances.

Whatever opinion I may privately entertain of the vicar's right in this case, I think I should be going further than the Court has hitherto gone, if I were to hold the right of the vicar established on the evidence now before me, unless I am to give effect to the rector's disclaimer in aid of the title of the vicar against the occupier; and this, as I have said, I cannot do without violating an important rule of practice.

(a) See *Id.* 694.(b) 3 *Ed. & You.* 716.(c) 2 *You. & Jerv.* 217.

 1841.—Cattell v. Corrall.

I will give the Plaintiff a decree for an account of the particular tithes claimed by this bill, without costs, or I will, if the Plaintiff desires it, reject the disclaimer, and the use I might make of it, and direct an issue.

[*216]

*CATTELL v. CORRALL.

November 3: December 17.

Each of two original suits to recover the same sum of money became defective by the insolvency of a party who was Plaintiff in the first of the causes and a Defendant in the second; the Plaintiff in the second suit not being a party to the first suit:—*Held*, that the defect in the first suit was not remedied by a supplemental bill in the second suit, before a decree was obtained in that suit.

THE Plaintiff, *Thomas Cattell*, as the vendor of certain premises, obtained a decree for specific performance of the contract of sale against the Defendant, *Christopher Corrall*, the purchaser, and also an order that the Defendant should pay the sum of 460*l.*, the residue of the purchase-money, into Court; and in November, 1840, the same was paid in accordingly to the credit of the cause.

On the 21st of January, 1841, the Court for the relief of Insolvent Debtors, pursuant to the act 1 & 2 Vict. c. 110, s. 37, made an order vesting the estate and effects of the Plaintiff, then a prisoner in the Fleet, in the provisional assignee. On the 8th of February, a rule nisi was made for the appointment of *H. Becke* to be assignee of the estate and effects of the Plaintiff, (section 45); and, on the 17th of February the order was made absolute, and *Becke* appointed assignee.

The Defendant, as it was alleged, on the 9th of February, 1841, tendered the conveyance to the Plaintiff, then still a prisoner in the Fleet, for his execution, but he refused to execute it; and notice of motion was then given for the 13th of February, that the said sum of 460*l.* might be ordered to be paid out of Court to the Defendant.

1841.—*Cattell v. Corral*

After the decree for specific performance was made in this suit, a second suit was instituted by one *Thomas Rowlatt* against *Christopher Corral*, *Thomas Cattell*, and another, wherein *Rowlatt* claimed to be entitled to the purchase-money of the premises as against *Thomas *Cattell*; and, after his insolvency, *Rowlatt*, in prosecution of the same claim, filed a supplemental bill against *Becke*, the assignee. [*217]

Mr. Temple, for the Plaintiff, *Cattell*, required that the motion, of which notice had been given, should be made or abandoned.

Mr. Sharpe, for the Defendant, *Corral*, said that the suit had become defective owing to the insolvency of the Plaintiff.

The motion stood over.

Mr. Temple, and *Mr. Anderdon*, insisted that the motion should be disposed of; and said that the defect arising from the insolvency of *Cattell*, had been sufficiently supplied by the original and supplemental bills filed by *Rowlatt*. The first bill by *Rowlatt* was supplemental to the original suit of *Cattell*; and the second bill by *Rowlatt* was therefore supplemental to both suits; the case was thus perfected by having all the parties before the Court. The Defendant had moreover treated the suit of *Rowlatt* as supplemental to his own, by intituling the notice of motion in all the causes.

Mr. Sharpe, and *Mr. Bird*, contended that the defect in the original cause could only be remedied by a supplemental bill in the same cause, or by a decree in the causes instituted by *Rowlatt* that the title of *Rowlatt* was wholly denied, and nothing but an adjudication in his favour could give him any interest in this cause, to which he was *prima facie* a stranger.

**Mr. Temple*, in reply, referred to cases in which the [*218] Court, having before it all parties claiming an interest in the subject in question, will, for many purposes, act before decree.

 1841.—Perkins v. Bradley.

VICE CHANCELLOR:—

The object of the motion is to deal with funds which stand to the credit of the cause in which *Cattell* is the Plaintiff. There is, at present, no proceeding by any party in the suit instituted by *Cattell*, or by the assignee of *Cattell*, to remedy the defect occasioned by his insolvency. I am informed, and it is not, in fact, denied, that the title of *Rowlatt* is disputed; and I cannot, therefore, before any decree is made in his cause establishing that title, consider or treat him as a person whose suit has remedied the defect in the cause of *Cattell v. Corral*, in which he is not a party. I must assume it to be possible, that, at the hearing of the causes, in which *Rowlatt* is Plaintiff, his bills may be dismissed; and in that case, the cause of *Cattell v. Corral* will remain defective, as it was before the supplemental bill of *Rowlatt* was filed, and as it still is. I cannot, on the other hand, permit *Corral* to make the insolvency of *Cattell* a reason for suspending indefinitely his present motion; and as he may, by the practice of the Court file a bill to make the cause of *Cattell v. Corral* perfect, I shall require him to do so forthwith, or entertain the application of the other parties to be relieved from the pendency of the notice. I do not at present give any opinion upon the question of whether a decree must be made in a suit by *Corral* against the assignees of *Cattell* to perfect the suit of *Cattell v. Corral* before the pending motion can be entertained, or whether the appearance of the assignee will be sufficient for that purpose.

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*PERKINS v. BRADLEY.

1841: December 23. 1842: January 13, 14, 18, 22.

Assignment of funds by a prisoner on a charge of felony, to secure payment on an antecedent debt, and costs to be incurred in his defence, established, notwithstanding his subsequent conviction.

A solicitor, who prepared a deed of charge on behalf of the mortgagor and mortgagee, held to have notice of that incumbrance on the occasion of taking a subsequent mortgage of the same property to himself.

A insisted by his answer, that B., a claimant of the property in question, should be a party; B. on being made a party stated by his answer that he had given notice of

1841.—Perkins v. Bradley.

disclaimer to *A.* before the suit began, but did not enter into evidence: the Court cannot determine the question of costs on the answers, but may direct an enquiry to ascertain when the notice of disclaimer was given.

The Bank of England ought not to be made a party to a suit for the purpose of giving effect to a charge upon stock standing in the name of a felon convict.

The Attorney-General on behalf of the Crown—defendant in a suit, claiming an interest in the goods of a felon convict, the subject of the suit, against purchasers for value, and failing in that claim, is not entitled to his costs out of the fund, as a matter of course.

HENRY Perkins was on the 13th of February, 1838, entitled to a sum of 675*l.* 3*½* per cent. Reduced Annuities, then standing in his name; and being in prison on a charge of felony, he, by indenture of that date, in consideration of 25*l.* paid or advanced for his use, and of a further sum of 25*l.* to be also advanced to or for him, covenanted to pay 50*l.* to the defendant *H. Bradley*, on the 26th of the same month, and assigned the said stock to secure such payment.

Henry Perkins was also indebted to the Plaintiff in the sum of 428*l.* 17*s.* for money lent; and, on the 24th of February, 1838, by an indenture of that date, he assigned the same stock to the Plaintiff, upon trust, in the first place to pay the said 50*l.*, interest, costs, charges, and expenses so due and owing to the Defendant *Bradley*; and then upon trust, in case default should be made in payment of the said sum of 428*l.* 17*s.*, on the 3rd of March, then next, to pay and satisfy the same, and pay the costs of the indenture, and all other costs, charges, and expenses incurred by the Plaintiff owing to the non-payment of his said debt, and subject thereto, in trust for *Henry Perkins*, his executors, administrators, or assigns.

This indenture was prepared by the Defendant **Bradley*, [*220] as the solicitor both of the Plaintiff and of *Henry Perkins*.

A distringas was laid upon the stock, on behalf of the prosecutors, but on application to the Court of Exchequer by *Henry Perkins*, the Defendant *Bradley* acting as his solicitor, the Lord Chief Baron, on the 7th of March, ordered the distringas to be removed, with costs to be paid by the parties at whose instance it had been sued out. On the same day, by the advice of the Defendant *Bradley*,

 1841.—Perkins v. Bradley.

the Plaintiff wrote to *Henry Perkins*, and desired him to sign a power of attorney authorizing the Defendant *Bradley* to sell the said stock or any part thereof, and such an instrument was accordingly executed by *Henry Perkins* on the 8th of March. On the 12th of March the Defendant *Bradley*, by virtue of the power of attorney, sold out 600*l.* stock (part of the said 675*l.*), and received the proceeds, amounting to 605*l.* 2*s.* 6*d.*

On the 14th of March, *Henry Perkins*, by indorsement upon the indenture of the 13th of February, charged the stock and funds therein comprised with the further sum of 50*l.* and interest, and also with all further sums in which *Henry Perkins* might become indebted to the Defendant *Bradley*, so that the principal monies to be thereby secured should not together exceed 100*l.* On the same day, *Perkins* signed a letter addressed to the Defendant *Bradley*, authorizing him to pay over unto his brother (the Plaintiff) any money that might be in *Bradley's* hands belonging to *Perkins* first deducting thereout all money due and owing to *Bradley* from *Perkins*, and any costs *Bradley* might incur “ respecting holding the same.”

[*221] On the 21st of March, 1838, at Cambridge, **Henry Perkins* was tried and convicted of felony, and received sentence of transportation for fifteen years.

The Plaintiff filed his bill, which was afterwards amended, and as amended was against *H. Bradley*, the *Bank of England*, the *Corporation of Cambridge*, and the *Attorney-General*. The bill prayed that an account might be taken of the monies by the indenture of the 13th of February, 1838, secured to be paid to the Defendant *Bradley*, and of the monies received by him from the sale of the stock, and that he might be decreed personally to pay what should be due from him on the balance of such accounts; that the indenture of the 14th of March might be declared fraudulent and void; that an account might be taken of what was due to the Plaintiff on the security of the indenture of the 24th of February, 1838, and that the same might be paid out of the monies due from the Defendant *Bradley*, and the 75*l.* stock remaining in the *Bank*; and that the *Bank*

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might be restrained from transferring or permitting the transfer of the said 75*l.* stock, or the payment of the dividends to any person on behalf of the Crown, or to the *Corporation of Cambridge*, or to any person except the Plaintiff; and that the Defendant *Bradley* might likewise be restrained from paying over the balance to any person except the Plaintiff.

The Defendant *Bradley*, by his first answer filed in August, 1838, claimed to retain out of the 605*l.* 2*s.* 6*d.* his said debt, the costs secured by the deeds, the costs which he claimed to retain by virtue of his lien, as solicitor of *Henry Perkins*, certain costs which he stated were specially directed by *Henry Perkins* to be retained, and the costs of the suit; and he submitted, that he could not safely dispose of the residue without the direction of the Court, by reason that *Perkins* was a felon *convict; and [*222] that, on the 21st of March, 1838, the Defendant had received a notice in writing, signed by the coroner of the borough of Cambridge, on behalf of the mayor, aldermen, and burgesses of the said borough, not to part with any monies or effects of *Perkins*, and claiming the same as their property under the grant of the Crown; and that, on the 30th of April, 1838, he had received notice from the solicitors of the Plaintiff of the indenture of the 24th of February, and requiring immediate payment of the amount thereby expressed to be secured. The Defendant submitted, that the remaining 75*l.* stock was subject to his said claims; and stated, that he did not know whether there was any consideration for the assignment of the 24th of February to the Plaintiff. The Defendant stated, that, after payment of his debt and costs, there would remain a balance of 387*l.* in his hands: he submitted, that the *Corporation of Cambridge* ought to be made parties.

The Defendant, *Bradley*, by his answer to the amended bill, said, that, on the 24th of February, the Plaintiff knew that he (*Bradley*) had undertaken the defence of *Perkins*, and to advance money for that purpose upon the faith of being paid out of the stock, which was the only property; that, on the 7th of March, immediately after the *distringas* was ordered to be removed, the Defendant in-

 1841.—*Perkins v. Bradley.*

formed the Plaintiff, and the father of the Plaintiff, in conversation with them, that a power of attorney ought to be executed, and the stock sold out; and the Defendant stated, that the understanding was, that thereout all costs of defending *Perkins* should be paid; and he submitted, that, notwithstanding the priority of date, the security of the Plaintiff was subject to the said claims of the Defendant. The Defendant also said, he was informed that the *Corporation of Cambridge* had withdrawn their claim; but [*223] he had received *no notice of such withdrawal, except from the answer of the *Corporation* in this cause, and observations made in the reports of the proceedings of the town council of Cambridge. The bills of costs were set out in the schedule to the answer, and consisted of the costs of the deeds, of the suit in the Exchequer by the prosecutors, and of the defence of *Perkins* on the criminal charge.

The *Corporation of Cambridge*, by their answer, said, on the 21st of March, they gave notice to the Defendant *Bradley*, that the monies and effects belonging to *Henry Perkins*, that day, convicted of felony at the assizes [court] of oyer and terminer, and general gaol delivery, for the county of Cambridge, were the property of the *Corporation* as grantees of the Crown; that they were informed, by a letter dated the 14th of April, from the Lords Commissioners of the Treasury, that, on the authority of a case decided in the Court of Exchequer (*a*), they were not entitled to the stock; and immediately on the receipt of that letter, they gave notice to *Bradley*, that they withdrew their claim; and they disclaimed all interest in the matters in question in the suit, and claimed their costs thereof.

The answer of the *Attorney-General* said, that he was a stranger to the matters in question, and, on behalf of her Majesty, claimed all such right and interest in the premises as he, on behalf of her Majesty, should appear to have therein; and prayed that the Court

(a) *The King v. Capper*, 5 Price, 217.

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would take care of the rights and interests of her Majesty in the same.

The evidence entered into, so far as it was material, was to the effect of the foregoing statement (a).

*Mr. *Sharpe*, and Mr. *G. L. Russell*, for the Plaintiff, [*224] on the validity of his security, as against the Crown, cited *Blackstone's Commentaries* (b), and *Shaw v. Bran* (c). The *Bank of England* was a party, and might either be directed to transfer the remaining stock, or to permit a transfer to be made by such person as the Court, under the act 4 & 5 Will. 4, c. 23 (d), should direct.

Mr. *Kenyon Parker*, and Mr. *Hetherington*, for the Defendant *Bradley*, insisted on the several grounds of claim stated by his answers.

Mr. *Wray*, for the *Attorney-General*.

The right of the Crown to the goods of a felon is inchoate on the commission of the act of felony: there is an immediate right to have an inventory taken, and although the felon and his family must be sustained out of the goods until his conviction, yet, subject to the necessary expense of their sustenance, the title acquired by the Crown, on the conviction, has relation back to the time of the act committed: *Hawkins' Pleas of the Crown* (e); *Jones v. Ashurst* (f). The statute *De Catallis Felonum* (g) enacts that none taken for felony, for which he shall be imprisoned, shall be disseised of his lands or chattels, until he be convicted thereof; but as soon as he is taken, his tenements and chattels shall be viewed by the sheriff, and other officers of the king, and lawful men, and inventoryed and kept by the bailiff of him that is so taken,

(a) Ante, pp. 219, 220.

(b) 4 Vol. pp. 387, 388.

(c) 1 Stark, 320.

(d) An act for the amendment of the law relative to the escheat and forfeiture of real and personal property holden in trust.

(e) Book ii. c. 49; Forfeiture, ss. 33, 34, 35.

(f) 13 Vin. Ab. p. 451; *see* Forfeiture (F), pl. 6.

(g) Incert. Tem.

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[*225] who shall give surety to the justices of the chattels or the price ; saving to the accused and his family their necessities, as long as he shall be imprisoned, and his reasonable estover ; so that when he is convicted *the residue of his chattels beyond his estover* (residuum catallorum ultra estoverium) may remain to the King, with the year and day of his lands.

The time and circumstances under which the assignments or mortgages of the funds in question were made, together with the letter of the 14th of March, which, as a contemporaneous document, must be considered a part of the same transaction, raise strong grounds to suspect that the assignment to the Plaintiff was not made bona fide. The Queen, to enforce her right by forfeiture, is equally with any other party entitled to the benefit of the statute 13 Eliz. (a). *Pauncefoot's case* (b) ; *Morewood v. Wilkes*. (c).

It is the duty of the Court to protect the right of the Crown ; and if the validity of the assignment to the Plaintiff is to depend upon the existence of consideration, an inquiry should be directed, whether any consideration actually passed. The *Attorney-General*, of necessity, must be ignorant of the facts, and cannot be prepared to meet the evidence which the parties claiming under the felon may produce.

[The *Vice-Chancellor* suggested, that no question appeared to be raised in the cause with respect to which any inquiry could be directed.]

The inquiry should be, under what circumstances, and
[*226] for what consideration, the several instruments, *and the power of attorney, in the pleadings mentioned, were executed, with liberty to report special circumstances.

Mr. *Blunt*, for the *Corporation of Cambridge*.

(a) Cap. 5.

(b) *Pauncefoot v. Blunt*, reported in *Twyne's Case*, 3 Rep. 82.

(c) 6 Car. & P. 144.

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The *Corporation* withdrew their claim, and gave notice thereof to *Bradley* before he answered to the original bill, and long before the amendment of the bill by which the *Corporation* were made parties: they afterwards put in a disclaimer; and the Plaintiff unnecessarily filed a replication to the answer and disclaimer. *Williams v. Longfellow* (a). The Court must take the answer to be true on the question of costs, as it is not contradicted by any evidence; and, upon looking at the answer, it is obvious, that the costs of the *Corporation* must be paid by the Plaintiff, whatever right the Plaintiff may have to recover them over against other parties.

Mr. Loftus Wigram, for the *Bank of England*.

The *Bank* is not a trustee. The only purpose for which the *Bank* can be made a party in suits relating to stock is, to obtain discovery or an injunction. The decree of the Court may decide to whom the stock belongs; and the *Bank*, without being a party to the suit, would permit a transfer to be made; or, in a proper case, the Court will, under the trustee act (b), appoint a person to transfer the stock. No decree can be made against the *Bank*, which is not the stockholder, but is merely the book-holder.

Mr. Sharpe, in reply.

There is no authority for the proposition, that the Crown has an inchoate right to the goods of a *felon before conviction. [*227] The title of the Crown only arises upon conviction, and there is no relation back with respect to personal property. There is no suggestion of any case, which would render it proper to direct an inquiry; and without such a case, it would be unjust to direct the inquiry at the request of the Crown; for whatever the result might be, the Crown would not bear the costs of it. The costs of the *Corporation of Cambridge* cannot properly fall upon the Plaintiff; for they were necessary parties, according to the statement in the first answer of *Bradley*, which was put in long af-

(a) 3 Atk. 582.

(b) 1 Will. 4, c. 60.

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ter the alleged withdrawal of claim, but contained no intimation of the alleged counter notice. The *Corporation* have made no attempt to prove the fact, that they gave such counter notice, and it is denied by the answer of *Brabley*. These Defendants may be entitled to have this question determined, as between themselves, but the Plaintiff can have no interest in it, and therefore, he has no need to be a party in the inquiry.

VICE-CHANCELLOR, after stating the facts :—

The circumstance, that the amount of the fund in dispute is insufficient to answer the several demands which are made upon it, will render it necessary to consider the questions of priority that arise between the Plaintiff and the Defendant, *Henry Bradley*, unless the claim which is made on behalf of the Crown can be established.

To the argument, that a colourable alienation of goods by a person under a charge of felony, for the purpose of avoiding a forfeiture, would be fraudulent and void as against the Crown,
 [*228] I assent ; but it is a principle *which is well settled, that, in the case of goods and chattels, the forfeiture has relation only to the time of conviction (*a*). The forfeiture is by conviction (*b*) ; a rule which is inconsistent with the proposition, that all the prior dealings of the felon, after the commission of the act, or after he was under the charge of felony, are to be overreached by his subsequent conviction. This conclusion does not rest merely on principle, but is clear upon several authorities. It is laid down by Sir *William Blackstone* (*c*), that the accused person may sell his goods for the sustenance of himself and family between the fact and conviction ; and the reason he assigns is, that “ personal property is of so fluctuating a nature, that it passes through many hands in a short time ; and no buyer could be safe, if he were liable to

(*a*) Hawk. Pl. Cr., b. 2, c. 49, (of Forfeiture), ss. 13. 30.

(*b*) Co. Litt. 391. a.

(*c*) 4 Bl. Com. 387, 388.

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return the goods which he had fairly bought, provided any of the prior vendors had committed a treason or felony ; yet" it is added, "if they be collusively and not bona fide parted with, merely to defraud the Crown, the law (and particularly the statute 18 Eliz. c. 5.) will reach them." And, comparing the effect of the forfeiture upon a trust with its effect upon a legal interest, it is said, "The trust of a term granted by a man for the use of himself, his wife and children, is liable to be forfeited, if fraudulently made with an intent to avoid a subsequent forfeiture ; but that it shall be forfeited so far only as it is reserved for the benefit of the party himself, if made bona fide, whether before or after the marriage, for good consideration without fraud, which is to be left to a jury on the whole circumstances of the case, and shall never be presumed by the Court where it is not expressly found (a)." In the case of *Jones v. Ashurst*, where a bill of sale made by a prisoner charged with robbery, to the intent, to "make pro- [229] vision for his son, was ruled fraudulent by *Holt*, C. J., it is said, by the same authority, that "a sale bona fide, and for a valuable consideration, had been good, because the party had property in the goods till conviction, and ought to be reasonably sustained out of them." And, in *Shaw v. Bran*, Lord *Ellenborough*, holding it necessary to shew the consideration for a deed executed by a party on the eve of his trial for a capital assault, adds, "If there had been a good consideration, the assignment would have been valid, although the object was to avoid a forfeiture."

The right of the Crown to an inventory does not of any necessity involve the larger right which is now contended for—the right to the property itself before conviction. The taking of an inventory is merely a precautionary step, and is not inconsistent with the rule of law which I have referred to. But it was said, that the plain inference to be drawn from the expression found in the authorities,—that a felon may sell goods for the sustenance of himself or his family,—is, that it is not competent for him to sell or alienate his property,

(a) *Hawk. Pl. Cr.*, b. 2, c. 49. s. 11.

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except for sustenance. I do not concur in this explanation. The meaning of the expression appears to me to be this—that inasmuch as the forfeiture, if it attached before conviction, would prevent the felon from selling or alienating his goods for any purpose, the circumstance, that he might clearly sell for sustenance until conviction, proved the rule that there is no forfeiture until then. The authorities are, however, perfectly sufficient to establish that principle.

In the present case, the assignment of the fund was made for value. The debt to the Plaintiff, which was the consideration for the assignment to him, is proved ; and there is no doubt that [*230] the costs of the defence, and of the other proceedings, which formed the consideration for the charge of *Bradley*, were actually incurred. Fraud cannot possibly be imputed from any thing which appears upon the evidence. On the part of the Crown, it is said, however, that I ought to send the case to an inquiry. If I directed such an inquiry, and the Master, on the present evidence, were to find that the assignment was not made bona fide, I should be bound to overrule the Master's report, if it were excepted to. No facts are suggested, upon which any matter for inquiry can arise ; and I am not aware of any principle upon which the Crown, or any other party, is entitled to ask for an inquiry upon no other ground than the possibility that some fact, of which there is at present no knowledge or indication, may happen to be elicited in their favour. I must treat the case of the Plaintiff, upon the assignment, as proved.

The question then is, what are the priorities of the several claims which are made ? The first charge is that which is created by the mortgage of the 13th of February ;—with respect to this there is no question. The second mortgage, in point of time, is that created by the assignment to the Plaintiff of the 21st of February. This deed was prepared by *Bradley*, as the solicitor of all the parties ; and to relieve him from the legal effect of the knowledge which he thus acquired, the Court must intend him to have forgotten the transaction when he took the subsequent security to himself on the 14th

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of March. But I cannot consider *Bradley* as being then ignorant of the assignment to the Plaintiff. "It might fall to be considered," says Lord *Eldon* in *Mountford v. Scott* (a), "whether one transaction might not follow so close upon the other, as to render it impossible to give a man credit for having forgotten it. [*231] I should be unwilling to go so far as to say, that if an attorney has notice of a transaction in the morning, he shall be held in a court of equity to have forgotten it in the evening; it must in all cases depend upon the circumstances." Having the first charge upon the fund,—the agent of the parties in the sale of the stock, and by that means having actual possession of a great part of the property,—the attorney for the prisoner in his defence, and looking, as he says, to the same fund, for payment of his costs—I must consider *Bradley* as having notice of the assignment of the 21st of February; and that assignment must therefore constitute the second charge upon the fund, unless it is displaced by some other of the claims upon which *Bradley* has insisted.

The first answer of *Bradley* rested his case upon the general lien of a solicitor; but the lien which a solicitor has upon a realized fund is not a general lien, but only a lien for the costs of the suit in which the fund was recovered. *Bozon v. Rolland*. (b) [1] *Bradley* cannot have any general lien upon this fund; and even if he had, his lien could not extend farther than to so much of the fund as belonged to *Perkins*, except it may be said, that in the proceeding to remove the distringas, which was for the benefit of all parties, he must be taken to be the solicitor of all parties, including himself. As against *Henry Perkins*, however, each of the parties would be entitled to add the costs he incurred in removing the distringas to the amount of his debt, and so charge them upon the residue of the fund. But at the time this proceeding took place, the fund was more than sufficient to satisfy the first charge upon it, and also the amount then

(a) T. & R. 280.

(b) 4 Myl. & Cr. 354.

[1] The attorney, in an action at law, has a lien upon the judgment recovered, for his taxable costs, but such lien extends no further than the costs in the identical action. *Phillippe v. Stagg*, 2 Edw. V. C. R. 108. See *Dunkin v. Vandenberg*, 1 Paige R. 622. *Wilkins v. Batteman*, 4 Barb. S. C. R. 47.

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due to the plaintiff, which is the second incumbrance in
 [*232] respect of *date ; and I think the justice of the case will
 be attained by placing the costs of removing the distrin-
 gas, in the situation of a third charge upon the fund.

In the answer of the Defendant *Bradley* to the amended bill, a further case is supposed to be found ; for it is there said, that there was an understanding (not intimating with whom, or in whose mind it existed) that the costs which he claims should be paid out of the fund. This case—found, for the first time, in the Defendant's second answer, and expressed by a professional man in such vague and indefinite language—is entitled to very little weight, unless supported by clear and distinct evidence. For this evidence I am referred to the deposition of *James Perkins*, a witness for the Plaintiff ; but his evidence is vague, and obviously inaccurate ; and the inference which the Defendant would desire that I should draw from one part of the deposition of the witness, is destroyed by another part of it, from which it is plain that he is speaking of something that took place previously to the meeting of the 7th of March, when the understanding is said to have originated.

The *Bank of England* was not a necessary party, and therefore the costs of the *Bank* must be borne by the Plaintiff. Nothing can be more comprehensive in its terms than the act (*a*), which was passed for the purpose of relieving both the *Bank* and the suitor from the necessity of the *Bank* being before the Court.

It has been argued, that on the question of costs a Defendant is entitled to read his answer, and the answer must be taken to be true, unless opposed by some evidence ; but it happens unfor-
 [*233] tunately for this argument, *that there are here two answers by different Defendants, one of which cannot be true. Some mode of ascertaining the truth must be resorted to. If it is desired by the Defendant *Bradley*, I will direct an inquiry, as between him and the *Corporation of Cambridge*, when the notice (if any) of the withdrawal of the claim of the *Corporation* was re-

(a) 39 & 40 Geo. 3, c. 36. *Edridge v. Edridge* 3 Madd. 324.

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ceived by him: if this inquiry be declined, the Plaintiff will be ordered to pay the costs of the *Corporation*, and to have them over against the Defendant *Bradley*. *Bradley* must be allowed his costs of this suit, as mortgagee, so far as it is merely a suit for redemption; and of the rest of the suit he must pay the costs, as in *Harvey v. Tebbutt* (a).

Mr. Wray, for the *Attorney-General*, asked that his costs might be ordered to be paid out of the fund. He said that the costs of the *Attorney-General* were always paid in cases where he was made a party, that the right of the Crown might be determined. *Attorney-General v. Earl of Ashburnham* (b). The cases in which there was a question with regard to a title in the Crown were very numerous, and it was only by making the *Attorney-General* a party, that such questions could be determined. Other Defendants, in like cases, might be entitled to their costs upon putting in a disclaimer; but such a course had never been adopted by the Crown: he had never heard of a disclaimer by the Crown. The revenue arising from sources of the nature in question in this cause was now the property of the public, rather than of the Crown, as it was carried to the public account. If the costs in such cases were refused, the consequence would be, that the public interest in many cases would be unprotected; for no public officer would incur the expence of appearance, unless he were indemnified by "receiving his costs. In this [*234] case especially the costs should be paid, for the Crown was converted by the act(c) into an implied trustee for the parties beneficially entitled.

VICE-CHANCELLOR :—

I cannot find that there has been a practice of invariably giving the *Attorney-General* his costs of appearing on behalf of the Crown out of the fund which is the subject in dispute. What the course may have been where the suit is to administer a fund under the directions

(a) 1 Jac. & W. 197.

(b) 1 Sim. & St. 397.

(c) 4 & 5 W. 4. c. 23.

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of the Court, and the questions are between parties who are volunteers, I have not at present to consider. In this case, the question was between two mortgagees, who were purchasers for value of the entire fund ; and the claim made by the Crown, and insisted upon at the hearing, was adverse to both. It would be most oppressive to lay it down as a rule, that the Crown might, in every case of suggested right, appear and contest the interest of the other parties, at their expence. It was said, that unless there was such a rule, there would in many cases be no appearance on behalf of the Crown. No doubt, in many cases, a very sound discretion would be exercised by not appearing. So far as the claim is made on behalf of the *Attorney-General*, as a public officer acting on the public behalf, his case may be properly assimilated to that of the Provincial Assignee of the Insolvent Court, or the Official Assignee in Bankruptcy, who, though public offices, are, I apprehend, in the situation, with respect to their title to the costs of appearing in this Court, as all other parties(b).

[*235] *Upon the case of the *Attorney-General v. Earl of Ashburnham*, I have no doubt. The Court has, there is no question, jurisdiction to give the *Attorney-General* his costs, where the Crown succeeds in its claim : the present question is on the right to costs, where the claim of the Crown has failed.

The present case is not distinguishable on the suggestion that the Crown is a trustee. The claim of the Crown was adverse to that of other parties, and was not a mere legal claim admitting the beneficial interest to be in other persons. I am of opinion that the *Attorney-General* is not entitled to his costs of the suit.

THE bill was ordered to be dismissed as against the Bank of England, with costs to be paid and borne by the Plaintiff ; and it was declared that the charges upon the 60*l.* 2*s.* 6*d.* cash and the 75*l.* stock ought to be satisfied in the following order : first, the sum secured by the indenture of the 13th of February, and the costs of this suit, (so far as it was a suit for redemption) ; secondly, the sum secured by

(a) See the cases of *Appley v. Duke*, and *Cash v. Belcher*, *infra*.

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the indenture of the 24th of February, and the Plaintiff's costs of this suit, (except the costs aforesaid); thirdly, the costs of the Defendant, *H. Bradley*, in respect of the proceedings relating to the distringas; and, fourthly, the sum secured by indenture of the 14th of March: and the fund being admitted to be insufficient to satisfy the said charges, the bill was ordered to be dismissed as against the *Attorney-General* without costs.

*TOMLIN v. TOMLIN.

[*236]

1841: December 3, 4, 6, 7, 9.

In a suit by residuary legatees of *A*, against the personal representatives of *B*, who was the executor of *A*, for payment of a debt due from *B* to *A*, the amount of which was not admitted, and also for an account of the personal estate of *A*, praying also, unless assets were admitted, an account of the personal estate of *B*, and that being insufficient, seeking to charge his real estate:—*Held* that the Plaintiff was not entitled to a declaration, that a particular debt or sum constituted an item in the account to be taken, but that evidence tending to shew that the Defendant should be charged with such particular debt or sum—was admissible.

The cases of *Law v. Hunter*, *Hornby v. Hunter*, and *Walker v. Woodward* observed upon.

ELIZABETH BELSEY, by her will dated the 21st of September, 1827, bequeathed her personal estate unto her brother and sister *Thomas Belsey* and *Mary Belsey* equally, for their joint lives, and to the survivor for his or her life, with remainder, subject to certain annuities, unto her cousins, the Plaintiffs, *John Tomlin* and *Thomas Minter Tomlin*, and the Defendants, *James Tomlin* and *Robert Sackett Tomlin*, equally; and she appointed her said cousins her executors. The testatrix died on the 4th of July, 1828. All the executors renounced probate, and letters of administration, with the will annexed were granted to *Thomas Belsey* and *Mary Belsey*.

Thomas Belsey, by his will, devised and bequeathed all his real and personal estate to *Mary Belsey* and her assigns during her life, with remainder, as to his *Fotheringhay* estates, unto and to the use of *Robert Sackett Tomlin*, his heirs and assigns, and as to certain messuages at *Margate*, unto *James Tomlin* and *Jane*, his wife, and,

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after their decease, to *Robert Sackett Tomlin*, his heirs and assigns; and he devised all his lands and hereditaments not thereinbefore disposed of unto and to the use of *James Tomlin* and *Robert Sackett Tomlin* upon trust for sale, with a direction to apply the proceeds of such sale as part of his residuary personal estate; and if his personal estate should be insufficient, he charged his *Fotheringhay* estates with the annuities, and the rents of the same estates with the legacies given by his will; and he bequeathed the residue of his personal estate to *Robert Sackett Tomlin* absolutely, and [*237] appointed *Mary Belsey*, *James Tomlin*, and *Robert Sackett Tomlin*, executrix and executors of his will. *Thomas Belsey* died on the 3rd of August, 1832, and his will was proved by his executrix and executors.

Mary Belsey died on the 21st of August, 1835, having made her will, and appointed *Robert Sacket Tomlin* and *E. Deering* executors thereof, by whom the same was proved. *E. Deering* afterwards died.

On the 3rd of November, 1835, *James Tomlin* and *Robert Sackett Tomlin* obtained letters of administration de bonis non with the will annexed of the personal estate of *Elizabeth Belsey*.

The bill was filed by *John Tomlin* and *Minter Tomlin*, against *James Tomlin* and *Robert Sackett Tomlin*, and the co-heirs at law of *Thomas* and *Mary Belsey*; and it stated, that a large part of the personal estate of the testatrix, *Elizabeth Belsey*, consisted of a debt of 50,670*l.* due to her from her brother *Thomas Belsey*, of 24,000*l.* and interest was secured by his bond, executed in 1818, in the penal sum of 96,000*l.* for securing to *Mary Belsey* and *Elizabeth Belsey* the sum of 48,000*l.* and interest, to which sum they were entitled in equal shares, without survivorship; that, after the death of *Elizabeth Belsey*, the greater part of such debt remained, with the privity of *Mary Belsey*, in the hands of *Thomas Belsey* alone, and that, after payment of the debts, expenses, and some of the legacies, there remained a balance of the personal estate of *Elizabeth Belsey*, due from *Thomas Belsey*, of 49,695*l.* 4*s.*, as appeared by an account exhibited in the Stamp Office, on the 18th of October, 1828, by *Thomas* and *Mary Belsey*, as such administrator and administratrix; and also by another account exhib-

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ited in the Stamp Office on *the 31st of December, 1832, by *Mary Belsey, James Tomlin, and Robert Sackett Tomlin*, as the executors of *Thomas Belsey*, and the trustees of his real estate devised for sale. The bill also charged, that the fact of said balance having been due was corroborated by indorsements on the bond, accounts in the handwriting of *Thomas Belsey*, and by the admission of *Robert Sackett Tomlin* and *E. Dewing*, the executors of *Mary Belsey*. [*238]

The bill prayed, that an account might be taken of the personal estate of the testatrix, *Elizabeth Belsey*, come to the hands of *Thomas Belsey, Mary Belsey, James Tomlin, and Robert Sackett Tomlin* respectively; and that the same might be answered out of the assets of the representatives of *Thomas* and *Mary Belsey* respectively, and by *James Tomlin* and *Robert Sackett Tomlin* personally; and that the clear residue might be ascertained, and two-fourths thereof paid to the Plaintiffs; and that, in taking the account, *Thomas Belsey* might be charged with the said sum of 49,695*l.* 4*s.*, so appearing to be due from him to the estate of the testatrix; and if assets should not be admitted, that an account of the personal estate, and (if that should be insufficient) of the real estate of *Thomas Belsey*, might, be taken, and so much of the debt as was secured by the bond raised and paid out of his real estate in a due course of administration; and that the amount of any personal estate applied in payment of the legacies and annuities, might be made good out of the real estate upon which the same were charged; and that, if necessary, the bill might be taken as a bill on behalf of the Plaintiffs, and all other specialty creditors of *Thomas Belsey*, and an account taken of the personal estate of *Mary Belsey* possessed by her executors.

*The Defendant, *Robert Sackett Tomlin*, by his answer, [*239] said that the debt from *Thomas Belsey* constituted the entire personal estate of *Elizabeth Belsey*; that it appeared and he believed it was the fact, that *Thomas Belsey*, in rendering the account of October, 1828, instead of dividing the amount due on the bond into moieties, and returning one moiety as belonging to *Elizabeth*

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Belsey, had either returned the whole sum mentioned in the condition, or taken half the penalty ; and that the mistake was not discovered until a short time before his death, when *Mary Belsey*, being satisfied of the existence of the mistake, released to *Thomas Belsey*, in consideration thereof, the whole of the sum due to her upon the bond, except 1000*l.* The Defendant said, that no balance of the personal estate of *Thomas Belsey*, or of the proceeds of his real estate directed to be sold, remained in the hands of his executors ; but the Defendant, as devisee of his other real estate, had entered into possession of the same, which was of the value of 90,000*l.* or upwards ; and he was, and always had been, willing to pay what was due to the estate of the testatrix upon the security of the bond out of the real assets of *Thomas Belsey* possessed by him.

The Defendant, *James Tomlin*, submitted that the Plaintiffs were entitled to the relief which they sought. The Defendants, the co-heirs, took no part in the question in the cause.

On behalf of the Plaintiffs, certain documentary evidence was tendered, and, in particular, “ An account of the personal estate of *Elizabeth Belsey*, late” &c., “ exhibited by *Thomas Belsey*, of” &c., “ and *Mary Belsey*, of” &c., “ the administrators,” &c. This account was in the usual form required to be rendered to [*240] the Stamp Office subsequent to the 31st of August, 1815 ; and the return was as follows :—

“ Cash in the hands of the said *Thomas Belsey*, the brother of the deceased, bearing interest at 4 per cent., as appeared at the death of the testatrix : - £50,670 0 0

Payments of the money received as above
[therein described] - - - - 974 16 0

Balance of cash in hand - - - - 49,695 4 0

Clear residue - - - - 49,695 4 0

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We do declare, that the foregoing is a just and true account and valuation of the residue of the personal estate of the deceased, &c.

(Signed)

THOMAS BELSEY,

18th October, 1828.

MARY BELSEY."

Mr. *Sharpe* and Mr. *W. C. L. Keene*, for the Defendant *Robert Sackett Tomlin*, objected to the admission of this evidence.—The decree can only direct an account to be taken of the personal estate of the testatrix; and evidence, for the purpose of shewing what should constitute a particular item in that account, cannot be received. *Law v. Hunter* (a); *Daniell's Chan. Pr.* (b). The Defendant had not entered, and could not at this stage of the cause enter into evidence to discharge himself. *Walker v. Woodward* (c).

Mr. *James Russell* and Mr. *Colville*, for the Plaintiffs.

Although it is stated, by the report of the case of *Law v. Hunter*, that the evidence was not read, yet it "will [*241] be found, on reference to the Registrar's Book, that the evidence was actually read (d).

(a) 1 Russ. 100.

(b) Vol. 2, p. 416.

(c) 1 Russ. 107.

(d) The following passage is found in the decree:—"Wherefore, and upon debate of the matter and hearing of the said indenture, dated the 24th of December, 1822, certain exhibits marked K, L, M, O, P, and T, the probate of the will of *John Hunter*, letters of administration of *James O'Brien*, granted to the defendant, *Elizabeth O'Brien*, letters of administration of the late *Maria Holmes*, granted to the defendant, *Thomas Hunter*, and the proofs taken in this cause, read, and what was alleged by the counsel on both sides, his Lordship doth order," &c. Reg. Lib. B. 1825, 881, 888. Whether the evidence which was entered was the same which is stated in the report to have been excluded, does not appear. The minute book of the Registrar, 26th of January, 1826, has a note to the following effect:—"First and second answer of defendant, *Thomas Hunter*,—*Francis Clark*,—the admission entered into by the solicitors on both sides,—the deed of covenant, 24th of December, 1822,—an exhibit marked,—*Ward*,—*Harman*,—*Baring*, (proving the amount of the stock), all offered to be read, but objected to by Mr. *Horne*, Mr. *Shadwell*, and Mr. *Barber*, for the defendant, *Thomas Hunter*.—Cur., allow the objection. Mr. *Sugden*, for defendants, Mr. and Mrs. *Hornby* and *John Hornby*. Mr. *Sugden's* evidence to be entered as read. Ex. K, L, M, O, P, T, read. Indenture, 24th December, 1822—Letters of admi-

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The VICE-CHANCELLOR said, the evidence tendered was applicable to the question whether the decree for an account ought to be made. The meaning of Lord *Gifford*, in *Law v. Hunter*, might be, that the evidence relating to the particular sums could not be received as a foundation for a decree without first taking the accounts: it could not be intended as holding that such evidence was [*242] in no case admissible for any purpose; for "unless the defendant by his answer submitted to account, the evidence might be material to shew that the Defendant was an accounting party. If it were said, that the liability to account might in this case be shewn by the admission of the Defendant in his answer, or by other means of proof, the argument was, in substance, reduced to this, that the evidence was inadmissible, because there was evidence enough to support the case without it,—a ground of exclusion which could not be maintained. His Honor said that there were, perhaps, other grounds upon which the right of the plaintiff to have the evidence received, might be supported,—that he would hear the evidence read, and reserve his judgment upon the point of law, until he gave his judgment upon the whole case.

The evidence in question, and other corroborative evidence, was read.

Mr. *Russell* and Mr. *Colville*, for the Plaintiff.

The amount of the debt due from *Thomas* to the estate of *Elizabeth* is proved; and the Court will, therefore, declare that sum to have been due, and direct the account to be taken on that footing. This will supersede the necessity of any account as between *Thomas* and *Elizabeth* in her lifetime, and relieve the Plaintiff from repeating the proof of the same debt in the Master's office.

The objection, that the Court will not receive evidence of the

nistration." It, therefore, appears that the evidence actually received was the evidence tendered for the defendants represented by Mr. *Sugden*; and, as these defendants were in the same interest with the plaintiffs, it is possible, though, perhaps, not likely, that it was the same evidence which was refused when tendered on behalf of the plaintiffs.

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amount of a particular item in an account to be taken, does not apply to this case. The suit is by the parties beneficially entitled under the will of **Elizabeth* against her personal representatives, for an account of her estate; and, inasmuch as her representatives will not proceed against *Thomas*, a debtor to her estate, it seeks to establish and thereby recover the amount of that debt, so that it may be brought into the account of *Elizabeth's* estate, and administered therewith. The simple and proper proceeding, therefore, is, at this stage of the cause, to determine what is due from the estate of *Thomas*, the debtor, to the estate of *Elizabeth*. The declaration in this respect is not asked on the ground that *Thomas* was administrator of *Elizabeth*; that fact is immaterial; the principle is the same as if a stranger was her representative, and a debtor to the estate was made a party, on a suggestion that there was collusion between them: the ground on which the declaration is sought is, that *Thomas* was the debtor, and it is competent, and according to the course of the Court, where the debt is proved, to declare that it is so: *Smith v. Wilkinson* (a); and the same is proved, incidentally, by *Smith v. Birch* (b); *Wilson v. Moore* (c); *Bacon v. Clarke* (d); and *Bradly v. Heath* (e).

Mr. Loftus Wigram and Mr. Goldsmid, for James Tomlin.

Mr. Sharpe and Mr. Keene, for the Defendant, Robert Sackett Tomlin.

The Plaintiff is only entitled to the usual decree for an account. The distinction between asking the declaration against the estate of *Thomas Belsey* as debtor, and as executor, might have involved some practical difference, if the executor and the debtor were not the same person, or if the demand were made [*244] against the debtor himself, and not against his estate after his decease; but the debt due from an executor to his testator's estate is assets in the hands of the executor, like any other sum

(a) Seton on Decrees, p. 46; S. C. 2 Newl. Pract. 335.

(b) 3 Beav. 10.

(c) 1 Myl. & K. 127.

(d) 4 Myl. & Cr. 294.

(e) 3 Sim. 561.

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which he actually receives from a third party: *Simmons v. Gutteridge* (a). And the debt, moreover, is sought to be recovered against the estate of the executor; and, in order to reach it, that estate must be administered for the benefit of all the creditors: *Johnson v. Compton* (b). The debt, therefore, must be established as against the other creditors in a proceeding to which they are or may be parties: *Seton on Decrees* (c). The Defendant has reserved his evidence to discharge himself, on the authority of *Walker v. Woodward*; and to deviate from the ordinary decree would be a surprise upon him: *Hornby v. Hunter* (d).

 VICE-CHANCELLOR:—

The Plaintiffs are two out of four residuary legatees of *Elizabeth Belsey*, of whose personal estate administration with the will annexed was granted to *Thomas Belsey* and *Mary Belsey*. They are since dead, and administration de bonis non of *Elizabeth* has been granted to *Robert Sackett Tomlin* and *James Tomlin*. The object of the bill is to administer the estate of *Elizabeth*; and the Plaintiffs, as they had a right to do, have brought before the Court the personal representatives of *Thomas Belsey* and of *Mary Belsey*, treating them as debtors of the estate of *Elizabeth*. The question is the same as if the now representatives of *Elizabeth* had filed [*245] a bill against those parties to make them account for what is due from them to the estate of *Elizabeth*. Upon that principle, I must eventually decide the point now before me.

The point upon which the contest has mainly proceeded, is the demand made by the Plaintiffs, that I should at once declare the sum of 49,695*l.* to be part of the assets of *Elizabeth*. On the part of the Defendants, an objection was taken to this, extending even to the admission of the evidence upon that point, on the authority of the cases of *Law v. Hunter* (e), *Walker v. Woodward* (f), and *Hornby v. Hunter* (g).

(a) 13 Ves. 264.

(b) 4 Sim. 47.

(c) pp. 52, 53.

(d) 1 Russ. 89.

(e) 1 Russ. 100.

(f) Id. 107.

(g) Id. 89.

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The case of *Law v. Hunter*, according to the report, appears to involve two propositions : first, that, upon a bill to have an account of assets taken, the only decree the Court will make is a decree to take the account generally, and that it will not, at the hearing of the cause, declare that any particular property forms part of the assets ; and, secondly, that the Court will not allow any evidence to be received which has for its object the proof of what the assets consisted (a). The first of these propositions is true, as matter of general practice ; and the danger of doing injustice by mere surprise, is a strong argument against lightly departing from that practice. But it certainly has always appeared to me, that there is great difficulty in following the case of *Law v. Hunter* to the extent of rejecting the evidence altogether ; for the evidence tendered to prove what the assets were, if inadmissible, for the purpose of obtaining a declaration that certain particulars constituted part of the assets, was material evidence to [*246] shew that the Plaintiff was entitled to a decree for an account. If the Defendant had, in terms, submitted to account, a different question might have arisen. But the answer contained no such submission ; this made it necessary for the Plaintiff to shew the Defendant's liability ; and if the evidence were admissible for one purpose, the Court was bound to receive it, though it could not afterwards be applied for another purpose. It is no answer to this, to say that the Plaintiff might have read from the answer admissions sufficient for his purpose. If the answer did not *in terms* concede the right to an account, that right became matter of evidence. But it is not upon this ground alone that I think the evidence admissible. In cases of account, I think each party has a right to bring before the Court, as fully as his interests may require, the whole subject upon which the decree for an account is to be founded. The circumstance, that the Court, in practice, acts by the Master in taking the account, cannot alter the case : and the mere fact, that the evidence might be lost, is a strong reason for admitting it. The cases of *Hornby v. Hunter* and *Walker v. Woodward* fall under

(a) His Honor adverted to what had been found in the Registrar's books of the case of *Law v. Hunter*, ante, p. 241.

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the same observations. I should scarcely presume to express myself so strongly as I have done, had I not satisfied myself that my opinion upon this question accords with that of others.

Assuming, then, that the evidence is to be received, what decree ought I to make? Against any other decree than a decree for an account, it was argued, on behalf of the Defendant, *Robert Sackett Tomlin*, that the debt due from *Thomas Belsey's* estate is to be considered as the assets of *Elizabeth*,—that a debt owing from an executor or administrator to the estate of his testator or intestate, is to be considered as assets in hand,—that the case is to be [*247] dealt with in the same way as if they were assets of any other description possessed by an executor or administrator,—and that nothing more than the common decree for an account can be made. The case of *Simmons v. Gutteridge* (a) was cited, which is supported by the earlier authority of *Wankford v. Wankford* (b). Those cases may, perhaps, be considered as deciding that the persons beneficially interested in the estate of the testator may elect to consider a debt owing from the executor as assets in his hands; but I think the law of the Court is, that if the executor says he has no such assets in his hands as are alleged,—if he denies the existence of the debt,—the Plaintiff may take him at his word, and may treat him as any other debtor of the estate, who might be brought before the Court on the allegation of colluding with the executor; and the Plaintiff, under such circumstances, would be entitled to a decree for recovering the debt against him, as from a stranger who was indebted to the estate. Some of the cases which have been cited on behalf of the Plaintiff would not otherwise be law; and I see no reason for questioning their correctness. But that will not affect the conclusion I have come to. The only difference is, that instead of treating the 49,695*l.* as being assets in the hands of *Thomas* and *Mary Belsey*, the case is to be considered as one in which the Plaintiffs are creditors seeking payment of the debt out of the assets of *Thomas* and *Mary Belsey*. The question is changed to one in which I have simply to consider

(a) 13 Ves. 264.

(b) 1 Salk. 299.

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what is the proper decree for the Court to make, where a bill is filed seeking to recover a debt against the assets of a deceased party.

If personal assets do not exist, or are insufficient, and payment is sought to be obtained by administering real estate, the form of the decree is, I apprehend, pointed out in [*248] the case of *Johnston v. Compton* (a), and the case in *Seton* (b); and is a decree on behalf of all the creditors. *Smith v. Birch* (c) may also be added. The principle upon which such decrees proceed, is stated in the cases of *Owen v. Dickson* (d), and *Shewin v. Vanderhorst* (e): these authorities I have recently followed in *Craddock v. Greenway* (f). Every general creditor who comes in under the decree has a right to question the claims of the other creditors upon the fund to which they must in common resort, and this can only be done, with convenience, before the Master.

Now the bill in this case proceeds against the real assets; and it prays, that, if necessary, the decree may be on behalf of all the creditors entitled to proceed against such assets. It is therefore necessary that the decree should be on behalf of all. If so, the usual course of the Court is not to declare that the debt is proved, but to use the proof in the cause only for the purpose of entitling the Plaintiff to the decree for an account, and not to preclude the proof of the debt from being again contested in the master's office. In fact, the debt of which I am required to declare the amount, is not the debt which the Plaintiffs seek to recover; for the bill prays a general account, and that this particular debt may be declared to form an item in it. I do not know that the Court has ever made such a decree. The only authority produced is *Smith v. Wilkinson*. On referring to the Registrar's Book, it appears that the Defendant admitted, by his answer, that he was to be charged with 8000*l.*, and the decree is made upon this admission [*249]: it is probable that the point was not contested. In the other cases mentioned, the Plaintiff sought to establish the

(a) 4 Sim. 47.

(c) 3 Beav. 10.

(e) 1 R. & Myl. 347; 2 R. & Myl. 75.

(b) *Dearnaley v. Robinson*, p. 52.

(d) 1 Cr. & Ph. 56.

(f) Nov. 11, 12, 1841. Not reported.

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amount of an equitable debt founded on some specific demand, or some breach of trust; but I do not find any case in which real assets were sought to be charged. There is no reason why I should depart from the ordinary course of the Court, which cannot be done in ordinary cases, without danger of injustice towards defendants. Great weight has always been given to this argument: *Hornby v. Hunter*; *Bullivant v. Taylor* (a). I am therefore not so much to consider whether I may declare that the amount of the debt is proved, as whether I am not at liberty to suspend my judgment. It is doubtful whether the Plaintiff would derive any benefit from the declaration even in point of time, and it might be very prejudicial to the Defendant. I forbear expressing any opinion on the evidence with respect to the debt. The discretion I exercise is by making in this cause the usual decree for an account. In the circumstances of the case, I think the evidence must be entered in the decree.

THIS Court doth order and decree, that it be referred to the Master to take an account of the personal estate of *Elizabeth Belsey*, the testatrix, in &c., not specifically &c., come to the hands of *Thomas Belsey*, deceased, and *Mary Belsey*, deceased in &c., or either &c., as the administrator and administratrix with the will annexed of the said testatrix, or to the hands of the Defendants &c., as the administrator de bonis non with &c., or either &c. [Inquiry of her personal estate outstanding or undisposed of]. And it is ordered, that what, upon taking the said account, shall appear to have come to the hands of the said Defendants &c. be answered by them personally; and &c. come to the hands of the said *Mary Belsey*, deceased, &c., by the Defendant &c., her surviving executor, out &c., in a due course &c.; and &c. come to the hands of the said *Thomas Belsey*, deceased, &c., or to have been due from him to the estate of the said testatrix at the time of his death [*250] &c. by the Defendants &c., his surviving *executors, out &c., in a due course &c.; and in case the said last-named Defendants shall not admit assets of the said *Thomas Belsey*, deceased, sufficient &c. [Inquiry what portion of any debt due from the estate of *Thomas Belsey* to the estate of the testatrix was secured by specialty, and what was due upon simple contract. Account of all other, if any, debts of *Thomas Belsey* remaining unpaid, usual directions, and liberty, at the request of either party, to make a separate report of such debts, exclusive of the demand in this suit. Account of the personal estate of *Thomas Belsey* and proceeds of his real estate directed to be sold, and of the same outstanding; the assets of *Mary Belsey* to answer what (if any thing) came to her hands]. And &c. the personal estate of the

(a) Not yet reported.

1841.—Geldard v. Hornby.

said *Thomas Belsey*, and the proceeds of his real estate by his will directed to be sold be applied in payment of what shall be found due to the estate of the said testatrix and to the other creditors of the said *Thomas Belsey*, (if any), for their debts, and &c., in a due course &c.; and in case such personal estate, and the proceeds of such real estate &c. should not be sufficient &c., then this Court doth declare, that the deficiency, as to so much of any debt which shall be found due from the estate of the said *Thomas Belsey* to the estate of the said testatrix as &c. due upon specialty, and all others (if any) the specialty debts of the said *Thomas Belsey*, deceased, ought to be raised and paid out of his real estate other than the real estate by his will directed &c. in due course &c. [If any personal estate exhausted by specialty creditors, the personal representative of the testatrix, as to what may be due to her estate on simple contract and the other simple contract creditors, entitled to satisfaction pro tanto out of his real estate.] And &c. what real estates other than the real estates by his will directed &c. the said *Thomas Belsey* was seised of or entitled to at the time of making his will, and what at the time of his death; and &c. an account of the rents and profits thereof accrued since his death, and received by the said *Mary Belsey* &c., or by the said Defendants &c., since the decease of the said *Mary Belsey*, or by any &c. And in case the said Defendant *Robert Sackett Tomlin* shall not admit assets of the said *Mary Belsey*, deceased, sufficient &c., due from her to the estate of the said testatrix, and to the estate of the said *Thomas Belsey*, deceased, respectively, then &c. an account &c. for the personal estate of the said *Mary Belsey*, deceased, come to his hands &c. [Inquiry of her personal estate outstanding or undisposed of.] And &c. an account of the debts &c. of the said testatrix *Elizabeth Belsey*, and of the legacies &c. Usual directions. And &c. that the said testatrix's real and personal estate not specifically &c., be applied in payment &c. in due course &c. and then in payment of the legacies [Liberty to state special circumstances.] And for the better taking &c. Usual directions. Liberty to apply.

Reg. Lib. B. 1841, fol. 453.

*GELDARD v. HORNBY.

[*251]

1841: December 23;24.

Where, after the second report, and day of payment fixed, in a foreclosure suit, the mortgagor was prevented by the act of the mortgagee from receiving the rents of the property, the time of payment was ordered to be enlarged for three months, upon payment by the mortgagor within one month of the interest and costs found due by the last report, notwithstanding there was doubt whether the value of the security was ample.

THE first report of the Master in a foreclosure suit, ascertained the amount of the principal and interest which would be due upon the mortgage on the 28th of January, 1841, and appointed that day

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for payment. Before that day arrived, the Plaintiffs, the mortgagees, required the Defendant's agent, who was receiver of the rents of the mortgaged premises, to pay over such rents to them; and a sum of 14l. 1s. 6d. was paid to them accordingly. A further reference to the Master was rendered necessary by this circumstance; and the 5th of January, 1842, was then appointed for payment. The notice of the mortgagees to the receiver of the rents not withdrawn; and the mortgagor, in consequence thereof, was unable to obtain any account or payment from the receiver, until December, 1841, after notice of this motion was given,—when the latter, in compliance with a request of the mortgagor, made some payment on his account in respect of the rents. It was now moved, on behalf of the mortgagor, that the time for payment of the money due on the mortgage might be enlarged.

Mr. *Sharpe*, for the motion, cited *Eyre v. Hanson* (a), and *Nanny v. Edwards* (b).

Mr. *Kenyon Parker*, and Mr. *Elmsley*, for the mortgagees, cited *Brewin v. Austin* (c).

The VICE-CHANCELLOR said, that the Plaintiffs had ['252] clearly, at one time, made the receiver their own agent; and but for the subsequent circumstances, especially the letter of the Defendant in December, 1841, treating him as still his agent, and the recent payment by the latter, at the Defendant's direction, the receipt of rent by the receiver could scarcely have been considered otherwise than as the receipt of the Plaintiff; and the latter would have found it difficult to avoid being charged with any loss which might have happened by the receiver's default: that, therefore, the mortgagor was justified in supposing that the rent detained by the receiver, at the mortgagee's direction, would again open the account; and the Defendant, in that state of things, was entitled to have the time enlarged. After the evidence given with

(a) 2 Beav. 478.

(b) 4 Russ. 124.

(c) 2 Keen, 211.

 1841.—*Willett v. Blanford.*

regard to the value of the property, no order should be made which would have the effect of adding any thing to the amount of the mortgage debt. The form of the old orders, enlarging time for payment of mortgage-money, invariably stated, that the security was ample; and it did not appear why that form was dropped. The conduct of the Plaintiff in this case entitled the Defendant to the indulgence which he sought, or the evidence of value would have made it necessary to hesitate before granting it; but the Plaintiff's security must not be impaired by increasing the amount of the debt charged upon it. The time should be enlarged for three months, the Defendant paying to the Plaintiff within one month the costs and interest found due by the last report of the Master, and, in default, to stand foreclosed. The Plaintiff was not justified in the course which he had pursued with regard to the property, and no costs of this application should be given. •

THIS Court doth order, that, upon the Defendant paying to the Plaintiffs, *J. Geldard, &c.* on or before the 25th day of January, 1842, the [*253] sum of 274*l.* 19*s.* 10*d.* being the amount of interest and costs which, by the Master's Report of the 5th day of July, 1841, it was found would be due to the Plaintiffs on the 5th of January, 1842, together with the sum of 16*l.* 0*s.* 6*d.*, being the amount of interest on the said mortgage securities from the said 5th day of January to the said 24th day of March, 1842, the time for the said Defendant's redeeming the mortgaged premises, be enlarged until the said 24th day of March, 1842; but in default of the said Defendants paying to the Plaintiffs the said sums of 274*l.* 19*s.* 10*d.* and 16*l.* 0*s.* 6*d.* for such interest and costs by the time aforesaid:—It is ordered, that the said Defendant do from thenceforth stand absolutely debarred and foreclosed &c.

WILLETT *v.* BLANFORD.

1841 : December 20 and 22.

1842 : January 12. February 22.

Where a surviving partner has carried on the partnership business without withdrawing from the concern the capital or share of a deceased partner, there is no absolute rule that, in taking the subsequent accounts of the partnership dealings, as between the surviving and the estate of the deceased partner, the division of the

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profits shall be determined by the aliquot shares of the several partners in the business, in their joint lifetime,—or by the amount of the agreed capital which they were respectively to supply,—or by the actual amount of the capital belonging to the surviving and the estate of the deceased partner respectively; but the principle of division may be affected by considerations of the source of the profit, the nature of the business, and the other circumstances of the case.

By articles of partnership, dated the 30th of December 1815, and made between *Gerrard Willett*, *William Vince*, and *William Blanford*, after reciting that *Gerrard Willett* had for some years carried on the business of picture-frame maker, and had (as well to ease himself of the trouble of the whole business, as for the confidence he had in *William Vince* and *William Blanford*), for the considerations thereafter mentioned, agreed to admit and accept them to be partners with him in the said trade, upon the conditions and agreements therein contained, the said parties severally and for their several executors and administrators, covenanted and agreed to the effect following:—

The partnership to be for a term of twenty-one years from the 1st of January, 1816, if all the parties should so long live, subject to the provisions thereafter mentioned. *Vince* and *Blanford* each to pay to *Willett* 400*l.* by two instalments, in 1821 and [*254] 1825, being one *fifth of 2000*l.*, the price at which the lease and stock in trade was agreed to be valued. *Willett* to receive 450*l.* yearly, and *Vince* and *Blanford* each 150*l.* yearly, out of the profits. The expenses to be borne, the profits divided, and the losses shared in the proportions of three-fifths by *Willett*, one-fifth by *Vince*, and one-fifth by *Blanford*. No partner to assign his interest in the partnership without the consent of the others, except *Willett* by his will; and in case *Willett* should die during the partnership term, *Vince* and *Blanford*, or the survivor of them, if they or he should so long live, to carry on the trade on the same premises for the residue of the term in co-partnership with the executors or administrators of *Willett*, or such other persons or person as he should appoint; and thereupon the executors and administrators of *Willett*, or such persons or person as he should appoint,

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and thereupon the executors and administrators of *Willett*, or such persons or person as he should appoint to be co-partners for the residue of the term, to be entitled to one-third of the profits. *Vince* and *Blanford*, or the survivor of them, and the executors and administrators of *Willett*, or the persons or person so appointed by him, to enter into articles of co-partnership for the residue of such term, in conformity to such agreement; and *Vince* and *Blanford*, or the survivor of them, to pay to the executors or administrators of *Willett* one-sixth of the value of his share and interest of the joint stock and trade beyond one-third part thereof the amount to be settled by appraisement, and such surviving partners or partner to execute their bond to such executors or administrators, for the payment of the remainder of the surplus within three years from the decease of *Willett*, by five equal half-yearly payments, with interest at five per cent.

William Vince died about three years after the date of the articles of partnership, and after his death *Gerrard Willett* and *William Blanford* carried on the trade "under the [*255] firm of *Willett* and *Blanford*, upon the footing of an agreement whereby *Willett* was entitled to the extent of seven-tenths and *Blanford* to that of three-tenths of the business: and in these proportions the profits were divided during the remainder of the life of *Willett*.

Benjamin Willett a nephew of *Gerrard Willett*, carried on the business of carver and gilder, and died in December, 1821, in embarrassed circumstances, leaving a widow named *Mertha Willett*, with whom the firm of *Willett* and *Blanford* then made an arrangement, whereby, in consideration of receiving two-thirds of the profits, they agreed to find the necessary capital to carry on the business of carver and gilder, and to allow *Martha Willett* the remaining one-third of such profits. *Martha Willett* died in *July*, 1827, and from that time *Willett* and *Blanford* carried on the business of carver and gilder under the same firm, dividing the profits between them in equal moieties.

In June, 1826, *Willett* and *Blanford* applied a part of the partnership money in the purchase of leasehold premises in Bouverie-street for the residue of a long term of years, and also in the improvement of the same premises; and in September, 1827, they removed the

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trades of picture-frame maker and carver and gilder, which had been theretofore conducted at different places, to their new premises in Bouverie-street, appropriating a part thereof to each business, the carving and gilding business paying a rent of 50*l.* per annum to the picture-frame business, and *Gerrard Willett* and his family residing in the dwelling-house on the same premises.

In August, 1829, *Gerrard Willett* died, having by his will dated in May, 1829, after certain specific bequests, *given his
 [*256] ready money, stock in trade, leasehold estates, and all the residue of his estate and effects unto his wife *Frances Willett*, *William Blanford*, and *Sophia Coley*, upon trust to pay unto his said wife an annuity of 200*l.* for her life or widowhood, and for the maintenance and education of his children, and subject thereto, and to certain other annuities thereby given, in trust for his said children equally, with power to advance their respective shares for their preferment in life; and if all his children should die under twenty-one, then in trust for *Sophia Coley* and *William Blanford* absolutely; and he appointed his said wife *Frances Willett*, *Sophia Coley* and *William Blanford*, executrixes and executor, all of whom proved the will. The children of the testator were at this time all infants.

After the death of the testator, until the expiration of the original partnership term of twenty-one years, and thence until the 31st of August, 1838, *William Blanford* solely managed and carried on both trades on the premises in Bouverie-street, under the firm of *Willett and Blanford*. The widow and family of the testator, during the same time, resided in the dwelling-house on the premises. No new articles of partnership were entered into by *William Blanford*, *Sophia Coley* or *Frances Willett*, the testator's widow; nor did *William Blanford* pay the value of the testator's interest within three years after his decease, or execute any bond to secure the same, according to the provisions of the deed of partnership of December, 1815. A friend of the testator, named *Allen*, who had, at his request, drawn out and stated the partnership accounts prior to his death, afterwards continued the statement of such accounts, and made the same up to the day

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of the testator's death ; and the account so made up was transcribed and entered in two books, and settled and signed by *Frances Willett*, **Sophia Coley*, and *William Blanford*, and [*257] also by *Allen*. This account represented the value of the capital, stock, and effects of the partnership in both trades, at the time of the testator's death, to be 10,948*l.* 15*s.* 7*d.*, the debts owing by the partnership 2, 799*l.* 12*s.*, the share of the testator 4,437*l.* 10*s.* 3*d.*, and that of *William Blanford* 3,711*l.* 13*s.* 4*d.* Of the aggregate capital, the sum of 143*l.* 7*s.* 4*d.*, and a debt due from the picture-frame business of 1,114*l.* 14*s.* 6*d.*, belonged to the carving and gilding business.

The amount of the testator's share in the partnership was not withdrawn from the trades. One-third of the profits, and interest at 5 per cent. on so much of the capital belonging to the testator as exceeded his third part thereof, on the footing of *Allen's* statement, were annually accounted for by *William Blanford*, until the dissolution in 1838. *Sophia Coley* died before the latter year.

The accounts of both trades, from the death of the testator, were stated up to the 31st of August, 1838 ; and the accounts of the testator's personal estate and effects were also stated. These accounts were examined by *Frances Willett*, and by her solicitor. The stock, property, fixtures, and effects of both the businesses were at the same time valued by *G. Willett*, the eldest son of the testator, on behalf of *Frances Willett*, and by another person on behalf of the Defendant *William Blanford*,—the premises in Bouverie Street were appraised, and the amount of the valuation and appraisement was carried into the accounts. These accounts, together with a notice of the dissolution of the partnership between *William Blanford* and *Frances Willett*, were signed by them, and the notice was published in the London Gazette on the 28th of September, 1838. An indenture, dated [*258] the 16th of November, 1838, was executed by *Frances Willett* and *William Blanford*, reciting the articles, the death of *Vince*, of the testator, and his will ; and reciting, that the business had been subsequently continued in conformity with the articles, un-

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til the expiration thereof, and thenceforward until the 31st of August, 1888; that, upon the dissolution of the partnership, the stock and effects of the same had been duly appraised and valued, and an account of the debts and credits of the joint trades taken; and that, upon the accounts so stated and settled between *William Blanford* in his own right and *Frances Willett* and *William Blanford* as surviving executrix and executor of the testator, the sum of 4,479l. 5s. 7d. was due to the partnership, and belonged to, and formed the whole of the residuary personal estate of the testator, which account they had respectively signed, and witnessing, that, in consideration of the covenant by *William Blanford* hereinafter contained, the said *Frances Willett* thereby released and delivered up unto the said *William Blanford* all the stock in trade and effects of the partnership; and *William Blanford* and *Frances Willett* thereby determined and dissolved the partnership as from the 31st of August then last, and *William Blanford* thereby covenanted to invest and secure the said sum of 4,479l. 5s. 7d. upon and for the existing trusts of the will of the testator, and in the meantime to pay and allow interest thereon at the rate of 5 per cent. per annum, and to pay all debts owing by the co-partnership; and it was thereby provided, that if the bad debts should exceed or fall short of 2000l., which had been deducted in respect of the same, one-third of such excess or deficiency should be allowed to or paid by *William Blanford*.

The share of *G. Willett*, the son of the testator, of the [*259] residue, according to the accounts stated, amounting to 647l. 5s. 6d., was paid to him at the request of the Defendant, *Frances Willett*; and by an indenture of the 16th of November, 1888, made between the said *G. Willett*, *Frances Willett*, and *William Blanford*, the said *G. Willett* released the other parties thereto from the payment of the said sum of 647l. 5s. 6d., and from all actions, suits, and demands against the said *Frances Willett* and *William Blanford* on account of the estate or effects of the testator in respect of the said sum, or on account of any other estate or interest of the said *G. Willett* under the said will.

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The bill was filed by five children of the testator, who had been infants during the foregoing transactions, and some of whom were still infants, against *William Blanford* and *Frances Willett*, and also against *G. Willett*, the son; and, after stating the facts to the foregoing effect, it charged, that the Defendant, *William Blanford*, had lent monies out of the partnership property on personal security, and had never brought in the 400^l. in respect of his proportion of the partnership capital under the articles. The bill prayed, that an account might be taken of the personal estate of the testator possessed by the Defendants, *William Blanford* and *Frances Willett*, and of his debts, and the legacies given by his will, and of the property and effects of the several trades at the time of his death, and of the dealings and transactions in the said trades since his death, and that the affairs of the said trades might be wound up, the property sold, and the share belonging to the estate of the testator ascertained,—and that the clear residue of the testator's estate might be ascertained and secured.

The Defendant, *William Blanford*, by his answer, said, that the 400*l.* in respect of his proportion of the capital had been paid in; and, admitting the facts to the effect of the foregoing statement, he stated an account of the profits of the [*260] picture-frame business from the 31st of August, 1829, to the 31st of August, 1838, shewing that they amounted to the sum of 11,726*l.*, and of the profits of the business of carver and gilder during the same period, amounting to 6,707*l.* The Defendant said, that, although he had voluntarily given up one-third of the profits of the business of carver and gilder for the benefit of the testator's family, yet if the accounts were opened and again taken, he claimed the whole of such last-mentioned profits from the death of the testator; and the Defendant claimed to be allowed such sums as he had expended in enlarging the premises. He insisted upon the accounts which had been taken and signed as binding settlements, and said, that the money which belonged to the estate of the testator had been retained in the partnership, at 5 per cent. interest, at the desire of the widow, and for the benefit of herself and family, in order

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that it might produce for their maintenance, and for the purposes of the will, a higher income than elsewhere.

Mr. *Sharpe*, and Mr. *Bichner*, for the Plaintiffs.

The interests of the several partners, at the determination of a partnership, must, in the absence of express provision to the contrary, be ascertained by a sale of the partnership effects: *Featherstonhaugh v. Fenwick* (a). The surviving partner, being also executor, was not in a position in which he could come to any settlement of the partnership accounts, even if that settlement had been founded on a correct principle of division. The settlement, insisted upon, was not so founded. The surviving partner is not at liberty to take the benefit of the clause in his favour in the partnership articles, "without taking the burden, and strictly following the provisions of such articles: *Wedderburn v. Wedderburn* (b). This is the rule in cases where a trustee insists upon an authority to deal with funds in a manner not ordinarily permitted: *Cocker v. Quayle* (c); *Hopkins v. Myall* (d). The benefit reserved by the articles to the surviving partner was, that of retaining one-third of the testator's capital in the business; and the condition annexed to it was, that the surviving partner should enter into new articles of partnership, give his bond for the surplus, and pay out the same by instalments. This condition has not been fulfilled,—the entire capital of the testator has been subjected to the risks of trade,—and, here, as in breaches of covenant, the Court cannot give any compensation for a risk or damage, the extent of which it cannot determine (e). The accounts must be taken as of a partnership which continued; and there should be a declaration, that the estate of the testator is entitled to the share of the profits to which the testator was entitled at the time of his death: *Crawshay v. Collins* (f); *Cook v. Collingridge* (g); *Wedderburn v. Wedderburn* (h).

(a) 17 Ves. 298.

(b) Per Lord Cottenham, 4 Myl. & Cr. 45.

(c) 1 Russ. & Myl. 535.

(d) 2 Russ. & Myl. 56.

(e) See 18 Ves. 68.

(f) 15 Ves. 218, 230; S. C. 1 J. & W. 274; S. C. 2 Russ. 325.

(g) Jac. 607, 614, 621 et seq.

(h) 2 Keen, 722.

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Mr. Temple, and Mr. Bacon, for the Defendant Blandford.

The settlements of the accounts in 1829 and 1838 cannot be treated as wholly nugatory: they are solemnly and deliberately come to by all the executors; and unless, therefore, the accounts upon which these settlements are founded can be shewn to be inaccurate, they will not be disturbed. There is no ground for excluding the Defendant from the benefit which the articles "have provided for the surviving partner: the entering into [*262] new articles, and the execution of the bond, are merely directory; they are not imposed as conditions precedent to the taking effect of the other stipulations of the partnership deed. The surviving partner, upon whom the sole management of the business devolved, is clearly entitled to two-thirds of the profits for the residue of the term; and there is no declaration, that he shall forfeit this benefit by omitting to observe another provision of the deed. The argument, that, independently of the deed, the profits, after the testator's death, are to be divided in the same proportions as before, is unreasonable and unsupported by authority. Such a general rule, disregarding the considerations which formed the ground of the division of profits in the lifetime of the partners, would be manifestly unjust. The inquiry directed in *Crawshay v. Collins* (a) would have been unnecessary, if the case might have been determined by reference to a general rule.

Mr. Evans, for G. Willett.

Mr. Green, for Frances Willett.

Mr. Sharpe, in reply.

Where an executor employs in trade the estate of his testator, and there had never been any partnership between the executor and the testator, the amount of the capital employed must determine the measure of profit for which the executor is to account; there is no other basis for the computation. But where the executor merely

(a) 15 Ves. 218.

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continues a partnership, he will, if that is most for the benefit of the parties interested in the estate of the deceased partner, be looked upon as continuing the trade upon its former [*263] footing. In *Cook v. Collingridge*, *this rule was inflexibly resisted on the ground that the capital of the testator had been withdrawn (a). In *Crawshaw v. Collins*, the inquiry was directed not to ascertain the plaintiffs' share of the profits, but how much of the capital belonged to the antecedent partnership, and thus to ascertain what the profits were of which they were entitled to their share: this appears not only by the reference, but by the later reports of the same case upon exceptions (b), and further directions (c). *Wedderburn v. Wedderburn* is a peculiar case: many new partners had been introduced; and the bill treated the share of the testator, which was retained, as assets employed by his executors, and the account was decreed accordingly.

VICE-CHANCELLOR:—

I have no discretion but to apply the settled rule of the Court. The Defendant, the surviving partner, would have been entitled, under the partnership articles, to continue the business for his own benefit to the extent of two-thirds; but, for this purpose, he was required to enter into further articles of partnership, and to give his bond for securing the capital of the testator remaining in the concern. The testator afterwards appointed him his executor, which occasioned a difficulty; but the defendant might have declined to prove the will, and claimed the benefit of the partnership articles; or proving the will, he might, at a very small expense, have executed the trusts of the will under the direction of the Court, and the capital of the testator beyond the third part would then have been protected by the Court. But neither of these courses has been taken. The result of the course which has been taken [*264] is, it was said, more *beneficial to the family or the tes-

(a) Jac. 614.

(b) 1 J. & W. 274.

(c) 2 Russ. 325, 327, 347.

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tator; but the Court cannot be guided by results in cases of this kind. The principle is, that the investment which the Court would direct is always the most beneficial; and the general result of a contrary rule,—that of permitting the funds of infants to remain in trade on the terms upon which it has been argued that they ought to be permitted to remain,—would be, that where the speculation succeeded the infants would receive 5 per cent., and no more; and where it failed, their property would be lost. There is no ground upon which Mr. *Blanford* can be relieved from his liability to account, unless he can bring himself within the protection of the partnership articles; but the provisions of the articles have not been pursued. No part of the capital of the testator was paid out of the partnership concern,—the whole remained subject to the risk, of trade,—no bond was given,—and no partnership articles applicable to the new state of things were executed. A valuation or appraisal of the stock and effects was indeed made,—but by whom? By the executor on his own behalf,—by the party who was bound, by the situation in which he had placed himself, to give to the estate of his testator the protection of his own vigilance. The valuation which was made may have been perfectly accurate and fair, but it is impossible that it can, within the view of this Court, be regarded as binding upon the Plaintiffs. As against the Plaintiffs, the arrangement or attempted adjustment of the accounts by the executor and executrix cannot be considered as more conclusive than a mere conversation between them, respecting the assets of the testator, would have been. Mr. *Blanford* meaning, I do not doubt, to act beneficially for the estate of the testator, has placed himself in a situation in which he is bound to account with respect to the profits of these trades. With the remarks respecting the general hardships upon de- [*265] fendants in such cases, I cannot agree. A party carrying on trade with capital, which he is aware belongs to others, cannot, in the known state of the law in such cases, justly complain that the Court compels him to account for the profits he has so obtained.

The next question is one of much difficulty,—whether, as the

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Plaintiffs insist, the estate of the testator is to have seven-tenths of the profits of one concern, and half of the profits of the other, because those were the proportions in which he was in his lifetime interested in the partnership? Lord *Eldon* has been considered to have decided in *Crawshay v. Collins* (a), that the estate of the party who had ceased to be partner was entitled to a share of the profits proportioned to the relative amount of the capital which remained. The point was certainly kept open by the decree (b); but it was understood that if upon the report it was found that an increased capital had been added to and employed in the concern, the assignees, in that case, would be entitled to a share of the profits upon the amount of that increase, in addition to the share of the profits which they were entitled to in proportion to the capital of the bankrupt at the time of his bankruptcy. Lord *Eldon* ultimately decided, that any money brought in by the continuing partners after the bankruptcy should be treated as a loan to the concern; but if there were an abstract proposition of law, that the partnership was to be considered as carried on in the same proportions of interest that the parties had at the time of the death or bankruptcy of the partner, without reference to the fact of money being afterwards brought in,—it is difficult to see what could have been the necessity for the inquiry, which Lord *Eldon* [*266] directed. The fact, that Lord *Eldon* directed an inquiry of the amount of capital actually employed from time to time, is at least a decision that the amount of such capital might be a material consideration in determining the proportions in which the profits should be divided. And if the principle be once adopted, that the amount of capital, brought in or added after the bankruptcy or death of a partner, would vary the proportions of the profits, it follows, as a logical consequence, that the subtraction of capital, or the alteration of its amount from other causes, might make a difference also. That the amount of capital employed is a material circumstance, appears also by the judgment of Sir *William Grant* in *Featherstonhaugh v. Fenwick* (c), where the inquiry

(a) 15 Ves. 218.

(b) See 2 Russ. 330. 333.

(c) 17 Ves. 314.

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was directed to ascertain what the partnership property was at the period of the dissolution,—what use was afterwards made of it—and what profits were subsequently produced by the trade, as in *Crawshay v. Collins*. In the subsequent case of *Brown v. De Tastet* (b), Lord *Eldon* says, that he does not lay it down as a rule, applicable to all cases, that the profits shall be divisible in the same way as if the partner had not died or become bankrupt, although that may be the law in some cases. When the case of *Crawshay v. Collins* afterwards came on, Lord *Eldon*, after expressing his opinion of what would be the more equitable rule in that case, says, “My opinion goes upon the particular circumstances of this case; and I do not lay down any principle which will decide any other case (c).” And the form of the decree, adopting the same guarded expression, is—“That having regard to all the circumstances of this case, the three-eighth parts or shares of *Mark Noble* in the partnership ought to be considered as continuing notwithstanding, and after his bankruptcy.” In point of fact, until the case of *Crawshay v. Collins*, there had not, [*267] I believe, been any case in which the Court had decided the points without previous inquiry as to the state of the property; and in *Crawshay v. Collins*, it came out, in the result, that the original share of the capital remained, and, therefore, when it was determined that the new capital was to be treated as a loan, there remained no principal of division but according to the aliquot shares of the parties in the partnership.

If the rule adopted by Lord *Eldon* in *Crawshay v. Collins*, was a general rule, Lord *Langdale* has distinctly overruled it in the late case of *Wedderburn v. Wedderburn*; for there, capital having been brought in by new partners, it has been decided that the case is not one in which the principle, ultimately acted upon in *Crawshay v. Collins*, and *Cook v. Collingridge*, can be applied. *Wedderburn v. Wedderburn* was confirmed by Lord *Cottenham* upon appeal.

(b) *Jac.* 284, 296.(c) 2 *Russ.* 347.

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The question I have very anxiously considered is, whether I ought now to adopt any rule, or whether I ought not to follow the course which was taken by Lord *Eldon*, and keep my hands unfettered, that I may hereafter do that which justice requires? If the case were one free from difficulty, and only requiring the simple application of an uniform rule, I cannot believe that Sir *William Grant* would have done that which he did in *Featherstonhaugh v. Fenwick*, or that Lord *Eldon*, down to the last year of his judicial life, would have done that which he did in *Crawshay v. Collins*, and have said that he would not decide that case without guarding himself by the observation, that what he did should govern the decision of no other case whatever. I must therefore, believe, that the circumstances of the trade and property of the partnership require very great consideration before I can finally dispose of this case. [*268] "Such are my present impressions; but I will consider this branch of the case further before I finally decide it.

VICE-CHANCELLOR :—

At the conclusion of the argument, I decided that Mr. *Blanford*, as the surviving partner, and one of the executors of the testator, having, after the testator's death, carried on the partnership trades without withdrawing therefrom, the testator's property was liable in equity to account to his estate for some portion of the profits made in each of these trades since the testator's death. I am not informed, at present, of the value of the stock in trade, or of the amount of capital or of the current profits of either partnership at the time of the testator's death, nor do I know to what extent the goodwill of either trade may then have constituted its value, nor to what extent the successful prosecution of each business may have been dependant upon the personal skill and attention of either partner, or upon new capital brought into the concern since the testator's death.

In this state of the case, it was strongly urged upon me, on behalf of the Plaintiffs, that I ought at once to declare, that the testator's estate was entitled to seven-tenths of the profits made since the tes-

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tator's death by Mr. *Blanford* in the trade of picture-frame maker, and to a moiety of the profits of the other trade: to this it was said, that the Plaintiffs were entitled, as matter of right, according to the decided cases. My opinion was, that the proposition thus contended for could not be maintained in the broad and unqualified manner in which it was stated; but, owing to the strong opinion which was expressed as to the state of the authorities upon the point, I thought it right to reserve my judgment.

"I have considered the subject, and read the cases to [*269] which I was referred, and I remain of the opinion I expressed at the close of the argument, that there is no rule of this Court applicable alike to all cases; and that there is no rule, which is so established or general in its application, that it is to be taken to be the general rule until circumstances are shewn which displace it. The facts of each case must be fully brought under the view of the Court before it can be in a position to state what, justice to the party seeking its protection may require, with due regard to the interests of all other parties.

No one can attend to the elaborate judgments of Lord *Eldon* in *Crawshay v. Collins*, *Brown v. De Tastet*, and even in *Cook v. Collingridge*, without being satisfied that his mind saw the impossibility of subjecting cases, so various as those of trading partnerships, to any universal rule. The decrees in those cases, that of Sir *William Grant* in *Featherstonhaugh v. Fenwick*, and the judgment and decree of Lord *Cottenham* in *Wedderburn v. Wedderburn*, confirming Lord *Langdale's* decree in the same case, all concur to establish the soundness of Lord *Eldon's* opinions; and I think it is impossible to consider the subject, abstractedly from authority, without feeling satisfied that justice would be endangered by an attempt to subject all cases of this description to any uniform rule.

The circumstances of some cases would almost exclude the possibility of making a decree in any other form than that which the Plaintiffs claim in this case. Take, for example, the case suggested by Lord *Eldon*, in *Crawshay v. Collins*, of the mere conversion into money at a large profit, long after the testator's death, of the very property

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which belonged to the partnership at his death, and no other circumstance to embarrass the question. Again, the dissolution of a partnership prima facie prevents new contracts being made on the joint account of partners; but it necessarily leaves the old contracts of the partnership to be wound up. In the absence of circumstances to alter the case, it would be impossible to deny the right of the estate of a deceased partner to participate in the profits arising from winding up the old concerns; and if, in such a case, the surviving partners should have so mixed up new dealings with the old, that the two could not be separated, the right of the estate of the deceased partner to share in the profits of the new dealings might unavoidably attach. In another case, a partnership may be formed, the substratum of which may consist of specific things of peculiar value in their use, as, for example, patents, the invention or property of one of the partners; and the profits made after the death of the patentee, or owner of the patent, may be derived wholly or principally from contracts subsisting at his death, but not wound up until long afterwards; or contracts entered into after his death, of which contracts his specific property (the patents) may have been the media. In such a case, and in the absence of special circumstances, it would be difficult to suggest a principle upon which the estate of the deceased partner should be refused the same proportion of the profits which he enjoyed in his lifetime. This appears to me to be the ground of the ultimate decision in *Crawshay v. Collins*.

Again, the whole, or the substantial part, of a trade may consist in good-will, leading to renewals of contracts with old connexions. In such a case, it is the identical source of profit which operates both before and after dissolution; and this appears to me to be the ground-work of Lord *Eldon's* reasoning in *Cook v. Collingridge*.

[*271] "Circumstances may be suggested of a very different kind. Take the case of a business, in which profit is made by the personal activity and attention with which the use of the money capital is directed; and the case may require a different determination: *Brown v. De Tastet*; *Featherstonhaugh v. Fenwick*. Or, there may be the case of two persons being partners together,

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in equal shares; one finding capital alone, and the other finding skill alone: and suppose the latter, before his skill had established a connexion, or good-will, for the concern, should die, and the survivor, by the assistance of other agents, should carry on the concern upon the partnership premises,—it could scarcely be contended, after a lapse of years, that the estate of the deceased partner was entitled as of course to a moiety of the profits made during that lapse of time after his death; and if his estate would not be so entitled where the deceased partner had left no capital, it would be difficult to establish a right to a moiety only, because he had some small share of the capital and stock in trade engaged in the business at his death, without reference to its amount and the other circumstances of the case.

If, on the other hand, the skill of an individual, without capital, had been exercised as a partner in a concern, until it had created a connexion and good-will, and, upon his death, his surviving partner, instead of giving to the estate of the deceased the benefit of that good-will by a sale of the concern, should think proper to carry on the concern for his own benefit until the connexion and good-will were lost, it would not be difficult to justify a decree which, in such a case, should declare the estate of the deceased entitled to share any profits made after his death.

If capital were to be taken as the basis upon which, [*272] in every case, the proportion of profits was to be calculated, much injustice would often ensue. In partnership cases, the agreed capital of a concern is considered in general as remaining the same, notwithstanding one partner may make advances to and the other abstract money from the concern. If, at the death of an acting partner, he had abstracted or borrowed money from the partnership exceeding the amount of his property in the concern, it would be anything but justice to hold as a rule of course, that his right to participate in the profits after his death should continue to the same extent as if his accounts with the partnership were adjusted, and he had given his time and attention to the business. The

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distinction also between capital and stock in trade, which forms so material a subject of consideration in *Crawshay v. Collins*, would often make it unjust to take the agreed amount of capital in partnership as a basis upon which to found a general rule applicable to the estate of a deceased partner.

I consider myself, therefore, bound by authority and reason to hold that the nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner at the time of his death, and the conduct of parties after his death, may materially affect the rights of the parties; and that I must have more information than I now possess before I can safely decide this case.

THIS Court doth order, &c., that it be referred to the Master, &c., to take an account of the personal estate and effects of *Gerrard Willett*, the testator, &c., come to the hands of the Defendants, &c. Usual Directions. Inquiries of the children of the testator, and of money paid to the Defendant, *G. Willett*, in respect of his residuary share. And it is ordered that the Master do take an account of the [*273] partnership dealings and transactions between the said testator, **Gerrard Willett*, and the Defendant, *William Blanford*, up to the death of the said *Gerrard Willett*, in regard to each of the businesses of a picture-frame maker and a carver and gilder, in the pleadings mentioned; but, in taking the said accounts, the said Master is not to disturb any account that he may find to have been settled between the said parties; and in taking such account, the Master is to take an account of the amount of profits drawn out in each year by each of them the said *Gerrard Willett* and *William Blanford*, and to ascertain and state the amount of the capital of each of them the said *Gerrard Willett* and *William Blanford* in the said businesses, and to calculate interest thereon at the rate of £5 per cent. per annum. And it is ordered that the said Master do take an account of the property and effects, debts and credits, employed in, or of, or belonging, or due to, and the debts due from, or the liabilities of each of the said businesses, at the death of the said *Gerrard Willett*. And it is ordered that the said Master do ascertain and state the amount of the capital of each of them, the said testator, *Gerrard Willett* and *William Blanford*, in each of the said businesses, at the death of the said *Gerrard Willett*. And it is ordered that the Master do ascertain and state of what the stock in trade in each of the said businesses consisted, and the respective values thereof, and also the value of the good-will of each of the said businesses at the death of the said *Gerrard Willett*. And it is ordered that the said Master do inquire and state if anything, and on what account, was due to the said testator, *Gerrard Willett*, at his death, from the said businesses, or either, and which of them; or from the said *William Blanford*, in re-

 1842.—*Curd v. Curd*.

spect of such businesses, or either, and which of them, exclusive of his the said *Gerrard Willett's* share of, or in the capital and stock in trade of such respective businesses. And it is ordered that the said Master do take an account of the amount and particulars of the capital from time to time employed in each of the said businesses, since the death of the said testator, *Gerrard Willett*, and by whom, and when, and in what manner the same respectively has been supplied; and also an account of the amount of profits made in each of the said businesses in each year since his (the said testator's) death. And it is ordered that the said Master do take an account of all sums of money which, since the death of the said testator, *Gerrard Willett*, have been retained, or paid, or taken either on account of profits, capital, or otherwise, out of each of the said businesses, or either and which of them, and the respective, times when, and by whom, and to whom, and for what purpose, other than such sums as have been paid on account of such businesses in the ordinary course of carrying on the same. And it is ordered that the Master do compute interest after the rate of five per cent. on all such sums from the respective times the same were retained, or paid, or taken. And it is ordered that the said Master be at liberty at the request of any party to state such special circumstances as to [*274] him should seem material as to the nature of each or either of the said businesses, and the manner of carrying on the same, as well in the lifetime of the said testator, *Gerrard Willett*, as since his death, for the purpose of shewing how far each or either of the said businesses may have depended on the personal skill of the said *Gerrard Willett* and *William Blanford*, or either of them. And it is ordered that the said Master do inquire and state to the Court whether, since the death of the said testator, *Gerrard Willett*, any and what alterations have been made in the partnership house and premises in the pleadings mentioned to be situate in Bouverie-street, Fleet-street; and by whom, and what money has been expended in making the same, and by whom, and how, or out of what fund paid or supplied. And the Master is to be at liberty, at the request of any party, to state special circumstances in relation to any of the inquiries and accounts before directed. And this Court doth declare that all such inquiries and accounts are directed without prejudice to any questions relating to the same, or in the cause. And for the better taking &c.

Reg. Lib. B. 1841, fol. 546.

CURD v. CURD.

1842: February 21.

Upon a motion for the production of documents described in a schedule to the answer, and admitted to be in the Defendant's possession, liberty will be given to the Defendant to file an affidavit as a ground for qualifying the order for production by permitting him to conceal such parts of the documents as do not relate to the subject of the suit.

1842.—Curd v. Curd.

MR. COOKE moved for the production of papers described in a schedule to the Defendant's answer, and admitted to be in his possession.

Mr. *Lewis*, for the Defendant, submitted to produce the documents; but said, that he was instructed that parts of them related to matters unconnected with the subject of the suit, and asked leave to conceal such parts of the documents as the Defendant should, by affidavit, state to relate to such other matters.

Mr. *Cooke*, in reply.

The general rule of the Court entitles the Plaintiff to the production of all documents described in the answer, and admitted to be in the Defendant's possession, unless the answer itself [*275] states a ground for abridging *the Plaintiff's right. This must be obviously the rule; for the documents are as much a part of the answer as if set out upon the face of it, and are only not set out for the sake of convenience and economy. The admission of any affidavit of the Defendant, for the purpose of varying the effect of his own answer, is perfectly anomalous, and is not a practice to be aided or encouraged. Admitting that the Court, to prevent great injustice, has, in some few cases, allowed a general admission in an answer to be qualified by a subsequent affidavit, such affidavit should be upon the files of the Court at the time the motion for production is made. No such affidavit has been made; and the Plaintiff is entitled to the order without qualification.

The VICE-CHANCELLOR referred to the case *Morrice v. Swaby* (a), and gave the Defendant leave to file the affidavit.

Affirmed by the Lord Chancellor, on appeal, March 8th, 1842.

(a) 2 Beav. 500.

 1841.—Wilkinson v. Page.

*WILKINSON v. PAGE.

[*276]

1841: December 23, 24. 1842. January 20, 21, 26.

An award, as between partners, providing for the application of the partnership assets, if there should be a surplus, but not providing for the event of a deficiency, is not, necessarily, invalid; for the Court, in support of the award, may, in a proper case, intend that the state of the assets is such as to render the latter provision unnecessary.

An award in other respects valid, is not rendered invalid owing to the nature of the remedy to which the parties are left, in order to enforce obedience to the award, provided the remedy be sufficient.

An award (under an order of reference in a cause seeking an account) directing accounts in question between the parties to be taken, without ordering payment of the balance which shall be found due, is not, therefore, bad; for the Court may enforce payment of such balance in the cause.

A sum of money, constituting an item in an account, being one of the matters in reference, the arbitrator directed the accounts to be taken, and the sum in question to be paid at a certain time, without reference to the state of the accounts at that time:—*Seemle*, this does not necessarily affect the validity of the award.

Among the matters referred to an arbitrator, was the question, whether *W.* or *P.* ought to be ultimately liable upon a promissory note, of which *P.* was the maker, and *W.* an indorsee, as surety for *P.*; and whether *P.* was entitled to an indemnity from *W.* against the liability of *P.* to pay the note when it became due? The arbitrator, by his award, among other things, declared that the liabilities of *P.* on the note, as between *P.* and *W.*, should remain unaffected by the award:—*Held*, that the award was not final, and was therefore bad.

THE Plaintiff, *Michael Eaton Wilkinson*, was for several years in partnership with *Charles Pearson* in the business of solicitors; the share of *Pearson* in the business being two-thirds, and that of the Plaintiff one-third. In October, 1839, *Pearson*, being appointed the solicitor of the corporation of London, retired from the partnership; and in January, 1840, an agreement was entered into between *Pearson* (with the assent of the Plaintiff) and the Defendant, *William Sagon Page*, for the purchase by the latter of a moiety of the partnership business for the sum of 1,500*l.* The Defendant, in performance of this agreement, paid *Pearson* 750*l.*, and gave his promissory note, payable in February, 1842, for the other 750*l.* *Pearson* paid the 750*l.* which he received into the partnership account, and he also gave the Plaintiff credit in the accounts between

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themselves for the amount due upon the promissory note, at the same time requiring the Plaintiff to indorse the note, which he accordingly did, thereby making himself a surety to *Pearson* for the payment of the amount due thereon. Soon after the new partnership began the Defendant complained to *Pearson* that the profits of the business did not answer the expectations he had been led to form; and in the course of the year 1840 differences arose between the Plaintiff and the Defendant on the like grounds. These differences increasing, and the Plaintiff considering that the Defendant was not qualified to give, or did not give, that assistance in the business which he was bound to do, in March, 1841, filed his bill, praying a dissolution, and that the accounts of the partnership might be wound up and settled. The Defendant, by his answer, in June, 1841, insisted, that as against him the Plaintiff had made no case for a dissolution; but he submitted to a dissolution of the partnership, upon terms: the Defendant insisted, that he had been induced, by the fraudulent representations of *Pearson*, to purchase a moiety of the partnership business at the price of 1,500*l.*, and that the Plaintiff was a party or privy to such fraudulent representations, and ought, in equity, to be affected by the fraud. And the Defendant submitted, that in any account between him and the Plaintiff, the Defendant ought to be allowed a deduction of the 750*l.*, the monies of the Defendant received by the Plaintiff, as appeared by the fifth schedule to the memorandum of agreement therein-mentioned, which sum was obtained from the Defendant by such mis-representations as aforesaid; and the Defendant further submitted, that he ought, in any such account as aforesaid, to be indemnified by the Plaintiff against being called upon by *Pearson*, or any other party, for payment of the promissory note for 750*l.*, and interest, when the same might become due. The Defendant also said, that, in the month of February, 1841, the Plaintiff asked the Defendant to give him (the Plaintiff) an indemnity against the said promissory note for 750*l.*, alleging that *Pearson* threatened to hold him (the Plaintiff) liable for the same; and that the Defendant, under the advice of his father, refused to give the required indemnity.

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By an order, dated the 10th of September, 1841, upon the petition of the Plaintiff, and by the consent of the Defendant, all matters in difference mentioned or referred to in the pleadings in this suit between the Plaintiff and the Defendant, were ordered to be referred to the "award, arbitration, final end, and determination" of Mr. Serjeant *Goulburn*, and the usual directions were given with respect to the examination of witnesses, the production of books and documents, and the power of the arbitrator to enlarge the time of making his award, and to dispose of the question of costs. And it was thereby ordered that the award in writing of Mr. Serjeant *Goulburn* should be final and conclusive on the said parties respectively, and that neither the Plaintiff nor the Defendant should prosecute or commence any action at law or suit in equity whatsoever against the other of them, nor against the said arbitrator, touching or concerning the matters or any of the matters referred to his arbitration, as aforesaid, or touching or concerning any matter or thing which he (the arbitrator) should do in or about, or concerning such matters, or any of them, or the reference to be directed. And it was ordered that either of the said parties should be at liberty to apply to the Court to have the award of the said arbitrator, to be made in pursuance thereof, made an order of the Court.

By a subsequent agreement, dated the 23rd of November, 1841, the solicitors of both parties consented and agreed that the arbitrator might, if he thought fit, award as to one of the matters so referred to him, in the event of his awarding a dissolution, that the accounts of "the partnership should be immedi- [*279] ately wound up, and the books and papers thereof deposited with one *J. S. Bowden*, and that *J. S. Bowden* should and might, with all convenient speed, receive the outstanding assets of the partnership, and pay the same to the joint account of the Plaintiff and Defendant, at their bankers, to be in the first instance applied in payment of the outstanding debts and liabilities of the partnership, together with incidental expenses, and afterwards to be applied upon the footing of the accounts, such accounts to be finally settled between the Plaintiff and Defendant by *J. S. Bowden*, in

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case they differed; and that both parties should do all acts necessary for winding up the partnership; that the Plaintiff should *guarantee* the Defendant against any demand of rent for the premises in Park-street; that the papers of clients should be delivered up to such clients upon the payment of what was due from them; and that the Defendant should deliver up to the Plaintiff the private papers belonging to the latter.

The arbitrator made his award dated the 24th of November, 1841, and thereby ordered and adjudged that the Plaintiff's bill should be dismissed without costs; that the co-partnership should be dissolved as from the date of the award; and as to the mode of winding up the accounts and other matters incidental thereto, and the person by whom the said accounts should be finally wound up and settled, the arbitrator referred to the consent and agreement of the 23rd of November, and made his award in the precise terms of that agreement. The award then proceeded as follows:—"And touching another matter in difference mentioned and referred to in the pleadings in the said suit, namely, the payment of a certain sum of 1,500*l.* by the said Defendant as and for a premium or [*280] consideration for the purchase of a "moiety of the business of the said partnership, and for half of which said premium, namely 750*l.*, the said Defendant has given his promissory note, payable at a day yet to come, and the other moiety whereof, namely 750*l.*, he the said Defendant paid in money, and which money found its way forthwith into the hands of the said Plaintiff, I do award and adjudge that on or before the 1st day of January, 1842, the said Plaintiff do repay to the said Defendant the said sum of 750*l.*; but in making this award I declare that I do not intend to affect or in any wise to vary any liabilities of the said Defendant in respect of the said promissory note for 750*l.*; but it is my wish and intention that any such liabilities of the said Defendant in that respect as between him and the Plaintiff remain wholly unaffected by this my award. And touching all matters in difference mentioned or referred to in the pleadings in the said suit other than those to which I have above referred, or on which I have above awarded, I

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do award, order, and direct that from and immediately after the due and full performance by each of the parties to the said suit, of all matters and things which by this my award are directed to be respectively done or suffered by each or either of them, each of the said parties shall, if required so to do, at the costs and charges of the other of them, execute to the other of them a release of all such last-mentioned differences so referred to me as aforesaid other than those to which I have above referred or in which I have above awarded."

The Defendant gave notice of motion for the 21st of December, 1841, that this award might be made an order of Court, and the Plaintiff be ordered, on or before the first day of January then next, to pay to the Defendant the sum of 750*l.* mentioned in the award.

Mr. *Wood*, for the motion.

*Mr. *Sharpe* and Mr. *Anderdon*, contra.

[*281]

The order to make the award a rule of Court is obtained by a motion of course, not requiring notice. The order for payment of the sum awarded cannot be made until the award is a rule of Court, and the Plaintiff has had an opportunity of moving to set it aside; if it could be obtained by an order *dehors* the award, the party objecting to the award might resist the motion by urging any objections which exist to the award; but that is not the practice: the practice is, that when the award is made a rule of Court, and one party comes to enforce it, the other party may meet the application by a motion to set it aside. The confusion in the practice arises from not distinguishing the cases of submission to arbitration out of Court, and a reference made in a pending suit.

Mr. *Wood*, in reply. The order to make the award a rule of Court could not be obtained as of course. It is a motion which can only be met by a cross-motion to impeach the award, but no notice of any cross-motion has been given. If the order should be obtained on a motion of course, that is no reason for refusing it on a motion with notice; that part of the notice which asks for payment may be treated as surplusage.

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The following cases were cited :—*Haggett v. Welch* (a) ; *Marquess of Ormond v. Kynnersley* (b) ; *Smith v. Symes* (c) ; *Salmon v. Osborn* (d) ; *Chivot v. Lequesne* (e) ; *Knox v. Symmonds* (f) ; *Rice v. Williams* (g).

*The VICE-CHANCELLOR, having caused inquiries to be [*282] made with respect to the practice, gave his decision as follows :—I think the motion is special, and required notice. The consequences of the award being made an order of Court appear sufficient to shew that notice is necessary ; and the form of the orders which have been produced by the registrar, and the opinion of the registrars, leave no doubt in my mind as to the practice.

Under the circumstances of this case, and from the uncertainty which existed as to the practice, the Plaintiff must have until the first day of next term to make a cross-motion, if he shall be advised so to do. The motion of the Defendants must stand over in the mean time.

The Plaintiff, having given a cross notice of motion that the award might be set aside, and declared null and void, for, amongst other things objections upon the face of the award, and for that the arbitrator had not arbitrated upon matters which were referred to him, and for that the award was uncertain and not final as to the matters arbitrated upon or referred to in the award.

Mr. *Sharpe* and Mr. *Anderden* moved accordingly. They chiefly insisted in argument upon the following points :—That the question on the pleadings was only a question of account, as incidental to the dissolution of the partnership, and that the reference did no more than transfer to the arbitrator the jurisdiction of the Court, which could only extend to a decree for an account, and an order upon further directions for payment of the balance ; that the Defendant had claim-

(a) 1 Sim. 134.

(b) 2 Sim. & St. 15.

(c) 5 Madd. 74.

(d) 3 Myl. & K. 429.

(e) 2 Ves. 316.

(f) 1 Ves. Jun. 369.

(g) 3 Bro. C. C. 463.

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ed the 750*l.* only as an item in the account, but the award had directed its repayment without reference to the state of the account; that the Plaintiff having only one-third share in [*283] the partnership account to which the 750*l.* had been carried, could at the utmost be liable to repay only one-third of that sum; that the ultimate liability of the Defendant in respect of the 750*l.* due upon the promissory note was a matter in difference between the parties, and was nevertheless left open upon the award; that no provision was made for enforcing payment of any balance which on taking of the accounts might be found due to the Plaintiff; that no provision was made for the contingency of the assets of the partnership being insufficient to discharge its liabilities; that it was not stated by whom the assets were to be drawn out of the bank and applied; and that the order as to "guarantee" (a) was indefinite and uncertain. *Randal v. Randal* (b); *Edgell v. Dallimore* (c); *Hopkins v. Davis* (d); *Thornton v. Hornby* (e); *In re Robson and Railston* (f).

Mr. Wood, for the Defendant, in support of the original motion (g).

The main question between the parties is on the right to a dissolution: the Defendant denies that right, but submits to a dissolution on being repaid the 750*l.* The Plaintiff does not, by his bill, ask for an indemnity against his liability on the note; and the indemnity which the Defendant claims by his answer is against the payment which he is liable to make to *Pearson* on the note. The Plaintiff does not, on the bill, insist that the Defendant is liable to him: the liability left undecided was not, therefore, a matter of difference between the parties on the pleadings. *Sallows v. Girling* (h).

*[The arguments for the Defendant on the other objections are noticed and acceded to by the *Vice-Chancellor* in his judgment.] [*284]

(a) The word used in the agreement, ante, p. 279.

(c) 3 Bing. 624.

(d) 1 Cro. M. & R. 846.

(f) 1 B. & Adol. 723.

(g) Ante, p. 280.

(b) 7 East, 81.

(e) 8 Bing. 13.

(h) Cro. Jac. 277.

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Mr. *Sharpe*, in reply.—The Defendant claims not merely an indemnity when he has paid, but against being called upon to pay. This question is left entirely open: the liability to the Plaintiff is to remain the same; but nothing is said as to the liability of the Plaintiff. The Plaintiff must have insisted on the Defendant's liability to him, or the arbitrator would not have reserved it; and being insisted upon, he ought not to have left it undecided.

VICE-CHANCELLOR :—

From the terms of this award it appears, First, that the arbitrator has taken the 750*l.* already paid by *Page* out of the partnership account, and awarded it to be paid on the 1st of January instant, without reference to the question whether the accounts should at that time have been taken by *Bowden* or not. Secondly, the arbitrator has not awarded payment of the balance to be found by *Bowden*, nor provided for the case of the assets under the administration of *Bowden*, being insufficient to wind up the partnership concerns. Thirdly, he has in general terms directed a guarantee to be given, without saying what the nature of that guarantee shall be. And, fourthly, with reference to the question respecting the 1,500*l.*, the purchase-money or premium agreed to be paid by the Defendant for the moiety of the business, the arbitrator has awarded that the Plaintiff do repay to the Defendant the 750*l.*; but the arbitrator declares that he does not intend to affect or in anywise to vary any liabilities of the Defendant in respect of the [*285] promissory note for 750*l.*; but it is his wish and intention that any such liabilities of the Defendant, in that respect, as between him and the Plaintiff, should remain wholly unaffected by the award.

Upon these four points in the award, the Defendant's objections are founded.

Upon some of these objections, I did not during the argument nor have I since felt any great difficulty. The 750*l.* paid by *Page* to *Pearson*, and the rights and liabilities of the parties in respect of

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that payment, were matters in difference between the parties to the reference; and if the learned arbitrator has miscarried in taking that item out of the general partnership account, and in directing payment thereof by *Wilkinson* before the accounts may have been taken, (a point upon which I give no opinion), I should have great difficulty, notwithstanding *Page's* answer upon that part of the case, in treating that as an excess of the powers of the arbitrator, or otherwise than as an error in law not affecting the validity of the award.

I think further, that the Plaintiff's counsel has overrated the difficulties with which his client's case would be affected, in supposing that if the award were made an order of Court in the cause of *Wilkinson v. Page*, the Court would have any difficulty in making an order in that cause for the payment of any balance which the accounts to be taken by *Bowden* might shew to be due from *Page* to *Wilkinson*, or from *Wilkinson* to *Page*; and if that were not so, (admitting, upon the authority of the cases cited at the bar, that performance of the award could not be enforced by attachment,) I should hesitate to decide that an award in other respects valid was rendered invalid only in respect of the nature of the remedy, "by means of which obedience to it was to be enforced. [*286]

I also think, that the Defendant's counsel has given a sufficient answer to the objection as to the absence from the award of a provision for winding up the partnership concerns in the event of the assets collected by *Bowden* proving insufficient, and also to the objection founded upon the word "guarantee" in the award. It may be, that the certainty of the amount of assets under *Bowden's* control, and the state of the partnership accounts, were such as to render it unnecessary that provision should have been made for the contingency upon which the former of the last-mentioned objections depends; and, in the absence of evidence to shew that such provision was necessary, the strong inclination of my opinion is, that the authorities upon the subject would oblige me to make an intendment to the contrary in support of the award (a); nor can I think that

(a) See *Watson on Awards*, 2nd ed. pp. 143—145.

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either party can complain of the mere use of the word "guarantee" in the award, seeing that the arbitrator has only used a word which the parties by special agreement authorized him to make use of in that part of the subject of reference as to which, on the 23rd of November, 1841, they agreed to substitute *Bowden* for the original referee.

Upon the remaining objection I have certainly experienced great difficulty. The arbitrator states in his award (as the fact was), that the whole 1,500*l.* was a matter in difference mentioned and referred to in the pleadings in the cause. He then proceeds to award, that 750*l.* part of this 1,500*l.*, shall be paid by *Wilkinson* to *Page* on or before the 1st of January instant. He then declares, [*287] that, in making his award, he does "not intend to affect or in anywise vary any liabilities of *Page* in respect of the promissory note for 750*l.*, but that it was his wish and intention that any liabilities of *Page* in that respect as between himself and *Wilkinson* should remain wholly unaffected by the award.

Now, what are the liabilities of *Page* which the arbitrator here refers to under the words "any liabilities of *Page*?" Certainly not the liabilities of *Page* to *Pearson*; for respecting such liabilities of *Page* there was not, and could not be either doubt or question. So far was this from being the case, that the admitted liability of *Page* to *Pearson* was the foundation of the claim set up by *Page* in his answer to be indemnified by *Wilkinson*. Then what other liabilities were there by which the words of the award are to be satisfied, and to which they must have reference? *Wilkinson* was liable to *Pearson* upon the note, and, in the absence of special circumstances, would be entitled to be indemnified by *Page* against any demand which *Pearson* might enforce against him upon the note. But *Page*, in his answer, insists that, under the special circumstances of the case, he is not liable in equity so to indemnify *Wilkinson*. In other words, he contends, by his answer, that in equity he is not ultimately liable upon the note. And it appears also by the answer, although that will not materially vary the case—that, in February, 1841, the month preceding that in which the bill was filed, *Wilkinson* had claimed to be indemnified by *Page* in re-

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pect of *Wilkinson's* liability to *Pearson* as surety for *Page* upon this very note. And the answer does not suggest that this claim was ever withdrawn.

The question, therefore, whether *Wilkinson* or *Page* was the party ultimately liable upon the note, was a matter in difference mentioned or referred to in the pleadings of the [*288] cause. The state of the question between the parties respecting the note for 750*l.* was simply this:—The primary liability of each party to *Pearson* was admitted, and the ultimate liability of *Page*, in the absence of special circumstances, was not, as in reason it could not be, a subject of controversy. But a question was raised, whether, under circumstances mentioned and referred to in the pleadings, *Page* was ultimately liable or not; and if the case alleged in the answer were true, there would or might be strong ground for supporting the proposition for which *Page* contended, and which his counsel adopted, by arguing that, if the fraud were made out against *Wilkinson*, he would be liable in solido to *Page* for the whole 1,500*l.*, whether he received the whole sum or not. Privately, in my own mind, I may perhaps be persuaded that the arbitrator meant to decide that the special circumstances relied upon by *Page* in his answer ought not to affect what I may call *Page's* natural liabilities upon the note—that is, his ultimate liabilities, both to *Pearson* and *Wilkinson*: but, unfortunately, the arbitrator has not said so. Instead of determining and awarding that the special circumstances insisted upon by *Page* shall not affect or in anywise vary *Page's* natural liabilities upon the note,—he declares only that *Page's* liabilities shall be wholly unaffected by the award, leaving the question raised in the pleadings undecided. [1] He says, in

[1] Where a cause in which several issues were raised on the pleadings is referred, the arbitrator is bound to find expressly on each, although he is not requested to do so by the parties. Therefore where to a declaration a defendant pleaded several pleas, and the arbitrator was not requested to find specially on each, and he awarded merely, that the plaintiff had no cause of action, and directed a verdict to be entered for the defendant: the award was held to be bad. *England v. Davison*, 9 Dowl P. C. 1052.

But where the terms of the award in deciding upon one of the issues, the legal effect of—
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effect, he will leave the question of *Page's* liabilities upon the note, as between himself and *Wilkinson*, undecided,—those very liabilities being, in the way I have explained, a matter in difference between the parties to the reference.

'The case of *Sallows v. Girling* (a) does not appear ['289.] to me to bear upon the question in this cause; for, in that case, no question was made as to the effect of the awards and bonds, which the arbitrators awarded to stand in force. An award, that a party should be entitled to the monies due under an award or upon a bond, might be good, if the effect of the award or bond was not in dispute; but otherwise, if the effect of the award or bond was a subject of difference between the parties. The mutual releases which are also awarded cannot help the case; for a decision to that effect would be to make the releases, which are part of the award, affect a subject which the arbitrator declares shall be wholly unaffected by the award. It is with great regret, therefore, that I am compelled to refuse the Defendant's motion, and accede to that of the Plaintiff: but I can give no costs upon either motion.

fect of which is to dispose of the other, the arbitrator is not bound to decide upon each issue unless he is requested so to do. *Duckworth v. Harrison*, 7 Dowl. P. C. 71.—By the terms of a submission a chancery suit and all matters of difference between the parties, were referred, and it was made an express matter of reference, whether an agreement between the parties should be rescinded or not, and the arbitrators only merely decided as to the chancery suit, but gave no direction upon the subject of rescinding the agreement, but awarded specifically upon every other subject matter of the agreement, it was held that the award was not sufficient. *Upperton v. Tribe*, 1 Har. & W. 280.

(a) Cro. Jac. 277.

TOPHAM v. LIGHTBODY.

January 21 22

The Plaintiffs claiming to be next of kin of the testatrix, filed their bill against the executors in respect of legacies which had failed: the executors answered, but did not admit that the Plaintiffs were such next of kin: the Plaintiffs moved, under the

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5th order of the 9th of May, 1839, for a reference to inquire who were the next of kin of the testatrix: motion refused.

A preliminary inquiry may be directed, under the 5th order of the 9th of May, 1839, where the evidence upon the answer is a sufficient foundation for the order, but not where, if the cause were heard upon that evidence, the bill would be dismissed. *Quere*, whether an affidavit might not be received in support of the motion, where the answer simply stated ignorance of the Plaintiff's title?

A MOTION was made, on behalf of the Plaintiffs, that it might be referred to the Master to inquire and state who was or were the next of kin of the testatrix in the pleadings mentioned, living at the time of her death, and whether any and which of them were dead, and who were the personal representatives of such next of kin, and that the Master should be at liberty to state special circumstances.

The testatrix bequeathed several legacies for charitable purposes, that could not take effect in so far as they were [*290] charged on that part of her personal estate which savoured of realty. The Plaintiffs claimed, as next of kin of the testatrix, to be entitled to the legacies which had thus failed. The Defendants were the executors of the testatrix, and they, by their answer, stated, that they did not know whether the Plaintiffs were or not the next of kin of the testatrix, or who were such next of kin. The fund in question was, by the consent of all parties, paid into Court to the credit of the cause.

Mr. *Sharpe*, for the motion, relied on the Order V. of the 9th of May, 1839.—This inquiry is necessarily preliminary to any decree affecting the subject of the suit. The application is, that instead of going before the Examiner, the proof of title may be made before the Master, in the presence of all persons who may claim adversely. The title of the Plaintiff is not admitted; but if that were necessary, the order permitting such inquiries before the hearing would be nugatory in the majority of cases.

Mr. *Follett*, contra.

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The order is not applicable to an inquiry on the question upon which the Plaintiffs' title depends. If the Plaintiffs are the next of kin, they will obtain a decree at the hearing,—if not, the bill will be dismissed. A creditor could not have a preliminary inquiry to prove his debt; or if a legacy were given to the children of A., persons assuming that character, and filing a bill for the legacy, would not be entitled to an inquiry for the purpose of making out their case. If the Master should find that the Plaintiffs are not the next of kin, the finding would not be conclusive on any party, and the Plaintiffs would thereby acquire the undue advantage [*291] of being enabled to re-commence the attempted proof of their title with the knowledge of the difficulties of their case, and that opportunity of overcoming them by additional evidence which it is against the policy of all the rules with regard to examination and publication to afford. The order has not received the construction implied by this motion: *Meinertzhagen v. Davis* (a); *Lee v. Shaw* (b).

Mr. *Sharpe*, in reply.

The first question is, how much of the property of the testatrix consists of pure personalty, and how much of personal estate savouring of realty,—to the latter of which the next of kin are entitled. This question can only be determined finally in the presence of the next of kin; and the inquiry now sought is preliminary to the adjudication in that respect. The case of the Defendants is, that they cannot safely act except under the sanction of the Court; and the inquiry will therefore aid the Court, in that manner which is the most simple,—in requiring the proof but once, instead of twice,—the least expensive for the same reason,—and the most satisfactory, inasmuch as it takes place not only as against the Defendants in this suit, but at the same time as against all the world.

(a) 10 Sim. 289.

(b) Id. 369.

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VICE-CHANCELLOR :—

The application must be determined entirely by the effect of the fifth order of the 9th of May, 1839 ; for it is only under that order that the Court has power, at this stage of the cause, to direct any inquiry of the nature which is now asked. The practice of the Court "has usually been to look to the answer [*292] alone, where there is an answer, for the foundation of interlocutory orders ; but in the present case, the answer controverts the title of the Plaintiffs ; for I cannot, upon motion, distinguish the case of a title not admitted from that of a title which is denied. In both cases the Plaintiff has to establish his title by proofs in the cause. Whether it would be a convenient course of proceeding, where the claimants are members of a class as next of kin, or (generally) in all cases which are investigated in the Master's office, that the office of the Master should be the original place of trial, rather than additional and cumulative to the original inquiry, as it now is ; or that a party seeking to institute inquiries before the Master should lay a sufficient foundation for those inquiries by affidavit in the first instance,—are not questions at present before me. If I cannot find in the answer such an admission of the title of the Plaintiffs as would justify the Court in directing the inquiry if the cause were now at the hearing, I have no discretion but to refuse the order which is sought. It was not intended that the fifth order, which authorizes preliminary inquiries, should dispense with the evidence, which the practice requires as a foundation for an order directing inquiries ; but (assuming that the evidence found in the admission of the Defendant by his answer, if he refused to consent, was sufficient for this purpose, and shewed at least some right in the Plaintiffs) the order was designed to amend the practice so as to permit an enquiry with respect to facts which it would be necessary to ascertain before the Court could adjudicate on the subject before it. It was not intended that the Court should exercise, or that it should have, the power of directing inquiries in cases where, if the cause were then set down, the bill must be simply dismissed, and where, therefore, the inquiries could not be said to be preliminary to any certain end. This motion must "be refused ; but it will not be [*293] necessary that I should make any order for the immedi-

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ate payment of the costs of it: they will be costs in the cause; and if the Plaintiffs succeed in establishing their title, the costs of the motion will come out of their own fund; if they fail, they will have to pay them.

KIMBER v. ENSWORTH.

February 19 and 21.

To a suit for the execution of a trust, created for the benefit of the Plaintiffs and other specified creditors, against the trustees, (the fund having been brought into Court,) the person who created the trust, or his personal representative, is a necessary party; and it is not a case in which the Court will, under the 40th order of August 1841, make a decree saving the rights of such party when absent, although the Defendants say that the trust fund is insufficient for the purposes for which it was created, and that there is, therefore, no surplus to be paid to the absent party.

The 40th order of August 1841, enabling the Court to make a decree saving the rights of absent parties, does not apply to cases where the security of an absent party might be prejudiced by the decree, or where the effect of the decree might be to transfer the legal interest in property in which the absent party is equitably interested:—*Semble.*

By an indenture, dated the 17th of March, 1815, *R. Griffin* assigned his estate and effects, comprising a real estate subject to a contract for sale, and his farming stock and crops, to *Churchill* and the Defendant, *Ensworth*, upon trust, in the first place, to pay their costs and expenses, and provide for an annuity as therein mentioned; and then upon trust that *Churchill* and *Ensworth*, and the survivor of them; his executors and administrators, should, when and so often as there should be sufficient of the trust-monies to pay 5s. in the pound upon the debts of the creditors of *R. Griffin*, who executed the indenture, make and pay a dividend of that amount to and amongst such creditors until the trust estate should be exhausted; and, in case there should be any surplus of the trust-monies after the said creditors should have been paid the full amount of their debts, and the other payments thereby provided for should have been made, or if any part of the trust estate and effects should then

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be undisposed of upon trust to pay over such surplus, and re-assign such estate and effects to *R. Griffin*, his executors, administrators, or assigns.

**Churchill* and *Ensworth* entered into possession of the [*295] trust estate and premises. Difficulties arose in the performance of the contract for sale of the real estate, and no dividend was paid to the creditors. *Churchill* received some part of the trust-monies, and in 1827, became bankrupt. In June, 1840, *R. Griffin* died intestate.

The bill was filed in July, 1840, by three of the creditors who executed the deed, on behalf of themselves and all other such unsatisfied creditors of *R. Griffin*, against *Ensworth*, and also against *Robinson*, the surviving assignee of *Churchill*; and it stated, that *Churchill* and *Ensworth* had sold and converted the trust estate and premises into money, and received the proceeds, and that the same, after payment of the prior charges thereon, amounted to a sum almost, but not quite, sufficient to pay the said creditors of *R. Griffin* in full; that no person had obtained administration of the estate and effects of *R. Griffin* in any ecclesiastical court, and that there was not any legal personal representative of *R. Griffin*; and if any person should become such legal personal representative, he would not have any interest in the matters in question, inasmuch as the whole of the real and personal property comprised in the said indenture had not realized sufficient to pay the creditors interested in that deed their debts in full. The bill prayed an account of the trust estate, and payment of the scheduled creditors pro rata.

Ensworth, by his answer, admitted, that there was no personal representative of *Griffin*; and said that *Churchill* had retained 1,406*l.*, which he claimed for costs; but that if he had not retained that sum, the trust-monies still, after the necessary payments were made thereout, would not have been nearly sufficient to pay the debts; *that it was not until 1834 enough had [*295] been received to pay a dividend of 5*s.* in the pound, and then he was unable to find the parties entitled thereto.

The fund, as admitted by the answer, was, upon motion, brought into Court. At the hearing,

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Mr. *Skirrow* and Mr. *Chandless*, for the Plaintiffs, submitted, that, under the 40th Order of August, 1841, the Court might make the decree, saving the rights of *Griffin's* representatives.

Mr. *Osborne*, for the Defendant *Ensworth*.

Mr. *Sharpe*, for the Defendant *Robinson*.

VICE-CHANCELLOR :—

In this case, I am asked to exercise the discretion given me by the 40th order of August last, by dispensing with the presence of a party who, according to the ordinary rule of the Court, is a necessary party to the cause. The suit is for the execution of a trust created for the sale of certain property, and the payment of scheduled creditors out of the proceeds; the amount of which, so far as it is admitted by the Defendant, has been brought into Court. The party absent is the author of the trust. The object of the 40th order was to remove a difficulty, which often arose at the hearing of a cause, from objections for want of parties being taken by Defendants, when the objections had not been suggested by the answer, and the rights of the absent party would be as well protected by the decree of the Court as if he were present; or, at all events, those rights could not be prejudiced by a decree made in their absence. The only effect of the objection was that of producing a supplemental suit, and delaying the decree. This appeared to [*296] *Lord *Cottenham* to afford a Defendant an opportunity of creating an impediment which it was not just that he should have; and he, therefore, approved of an order giving the Court a discretion to proceed, notwithstanding the absence of a party in such circumstances. It was not contemplated, that the Court would ever exercise the power which the order gave in a manner which would be prejudicial to an absent party. If, in this case, the trust-fund should be distributed under the decree of the Court in the absence of the author of the trust, it is quite clear

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that he or his representatives might, in another suit, obtain a decree against the trustees for an account; and the effect of the present decree may have been to have given him or them the personal security of the trustees, in substitution for the security of a fund in Court. In the case of *Walker v. Jeffreys (a)*, I was desired to decree the execution of a lease in the absence of persons beneficially interested in the estate which was to be the subject of the lease: this I refused to do, upon the ground that a party, who is in equity the owner of property, might be seriously prejudiced if the legal interest were, without notice to him, assigned to another person. The difficulty, in that case, was got over by a direction in the Decree, to which the parties consented, that the will, under which the absent parties were entitled, should be recited in any lease which might ultimately be granted.

If this cause were now to be heard on *further directions (b)*, and the fund was not in Court, but the decree was to be made against the trustees personally,—they not objecting on the ground of the defect of parties,—I am not prepared to say, that the Court might not make the decree in the absence of any [*297] personal representatives of *Griffin*: I do not express any opinion upon such a case; but, as it now stands, the fund being in Court, and the distribution being to take place by the order of the Court, I have no doubt that I ought not to proceed until the defect of parties shall be supplied.

(a) *Infra*.

(b) His Honor in another case said, that a decree ought not to be made at the original hearing, in the absence of a party interested, as a fund might afterwards, in the progress of the cause, come into Court, and be distributed.

 WOODWARD v. CONEBEER.

April 15, 16, 25.

The stat. 1 Will. 4, c. 36, s. 15, rule 5, does not make it imperative upon the Plaintiff to bring a Defendant, who is in custody, up to the bar of the Court within

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thirty days, but only deprives the Plaintiff of the benefit of his process, and entitles the Defendant to his discharge, if the Plaintiff does not so bring him up. A prisoner, who, having been placed in custody by a lawful attachment, has remained in prison voluntarily, without claiming his discharge after he was entitled to be discharged, may be regularly detained under another attachment lawfully issuing against him.

On the 5th of November, 1841, the subpoena in the cause was served upon the Defendant; and on the 24th of November, 1841, an attachment issued for want of appearance, under which he was lodged in Worcester gaol. On the 24th of December, 1841, an appearance was entered for the Defendant under the statute, in pursuance of an order of the Court for that purpose. At the expiration of thirty days from the time that he was actually in custody, the Plaintiff not having brought him to the bar of the Court, the Defendant became entitled to be discharged (a); but he remained in gaol without claiming his discharge. An attachment issued against him on the 27th of January, 1842, for want of answer, and was lodged at Worcester gaol by way of detainer. On the 21st of February, 1842, the Defendant was brought up by habeas corpus, and turned over to the Fleet tum causis.

Mr. *Girdlestone*, for the Defendant, now moved that the writ of attachment of the 27th of January, and the order of commitment of the 21st of February, might be discharged, and that the Defendant might be discharged out of the custody of the warden of the Fleet with costs to be paid by the Plaintiff.

[*298] *The ground of the application was, that the prisoner, not having been brought by the Plaintiff to the bar of the Court within thirty days from the time of his being in custody, was, after that time had expired, wrongfully detained, and that the subsequent process was, for that reason, irregular: *Greening v. Greening* (b); *Lewis v. Evans* (c); *Needham v. Needham* (d).

Mr. *Baily*, contra.

(a) See stat. 1 Will. 4, c. 36, s. 15, rule 5.

(b) 1 Beav. 121.

(c) 1 Cr. & Ph. 264.

(d) Before the Vice-Chancellor of England, 19th April, 1842.

 1842.—Woodward v. Conebeer.

VICE-CHANCELLOR:—

It is admitted, that both the original arrest under the attachment for want of appearance, and the appearance entered for the Defendant on the 24th of December, 1841, have been regular; and, (although that is not admitted), I think that the attachment for want of an answer also issued regularly. If the detainer under that process were irregular, that would not affect the regularity of the attachment itself, independently of the execution of it. The Plaintiff might regularly issue the attachment, even if he were not able regularly to serve it. The right to compel an answer by the proper process arose at a given time after the appearance was regularly entered, and did not depend upon the position in which at that moment the Defendant might be. If, after the attachment for want of an answer had issued, the Defendant had been found at large, whether by his own act or that of the Plaintiff, and had been arrested under the attachment, I apprehend the present question would not have arisen.

The question then is, whether, admitting the "attach- [*299]
ment for want of an answer to have issued regularly, the
detainer was lawful. It was argued, that a detainer lodged against
a party unlawfully in custody is invalid, and that the party so de-
tained is entitled to his discharge. The proposition, thus broadly
stated, cannot, I conceive, be sustained.

In *Hutchins v. Kenrick* (a), the Defendant was regularly entitled to be superseded. An order for his being superseded had become absolute, but the Defendant had continued in custody without carrying the order into execution by getting himself actually and in fact superseded. Whilst the Defendant was in actual custody, long after he was entitled to be superseded, a declaration was delivered at the suit of *Hutchins*. The Court held the detainer good, admitting, however, that the case might have been otherwise if the Defendant had been irregularly in custody at the suit of *Hutchins*. The Court said, "The Plaintiff found the Defendant in actual custody, and had a right to charge him in custody without inquiring whether he was entitled to be superseded or not. If he could not

(a) 2 Barr. 1049.

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charge the Defendant in custody, the debtor would not be amenable to justice at all; for the Plaintiff could not arrest him, not being at large, nor would have any other way of coming at him." In *Hawkins v. Hall* (a), Lord Cottenham, after stating the general principle to be, that the author of wrong, who has put a person in a position in which he had no right to put him, shall not take advantage of that illegal act, is reported to have said—"And the Court would not allow a party to take advantage of that illegal act, even although he were not himself the author of it." I may be permitted to doubt whether the words I have quoted are correctly attributed to Lord Cottenham; for, besides the case of *Hutchins v. Kenrick*, which is a direct authority the other way, there are numerous other cases according with *Hutchins v. Kenrick* upon that point.

In the cases in which it has been held, that a detainer was invalid upon the ground of the party charged thereby being at the time entitled to be discharged out of custody, the Court appears to have gone either upon the ground that the party charging him or arresting him could not take advantage of *his own* wrong, or that the party charged was *privileged* from arrest at the time the detainer was lodged (b). My only doubt in this case was upon the first of these grounds, which alone could distinguish it from *Hutchins v. Kenrick*, and the other like cases; but I do not think that the Plaintiff here has taken any advantage of his own wrong in having, by the sheriff as his agent, detained the Defendant. I do not read the statute (c) as imposing upon the Plaintiff an obligation at all events to bring up the Defendant to the bar within the thirty days, but only as depriving him of the benefit of his process, and as entitling the Defendant absolutely to his discharge upon his own application, if the Plaintiff do not bring him up within the thirty days.

If it were decided, that the attachment for want of an answer

(a) 4 Myl. & Cr. 280. See note 1. See also 7 Beavan, 79 note 1.

(b) See cases collected in Archbold's Practice, Q. B., Vol. I., pp. 526, 535, 7th ed.; *Hawkins v. Hall*, 1 Beav. 77, and cases cited in note; *S. C.* 4 Myl. & Cr. 280; *Lewis v. Evans*, 1 Cr. & Ph. 280.

(c) 1 Will. 4, c. 36, s. 15, reg. 5.

 1842.—Woodward v. Conebeer.

could not be executed so long as the Defendant from any cause remained in custody, it would follow either that, by wilfully remaining in gaol, he might deprive the Plaintiff of all discovery, or the Plaintiff would be obliged, without any object, to take steps for *procuring that discharge to which the very words of [*301] the statute entitle the Defendant, without any interference from, and even in spite of, the Plaintiff. By the 5th rule, the gaoler is directed to discharge the prisoner when circumstances have arisen which would lie peculiarly within his knowledge. The 18th rule differs in terms, as it does in the circumstances under which the right of the prisoner to his discharge arises; not that I mean to express an opinion that the case would have differed under that rule. The Plaintiff himself appears to have done nothing that was not strictly regular on his part. And if the Defendant did not claim his discharge, but voluntarily remained in Worcester gaol, I cannot think he has any ground of complaint against either the Plaintiff or the sheriff, only because the sheriff did not go through the ceremony of compelling him to go outside the walls of the prison, in order to give his detainer the form of a new arrest.

It was said, however, that the order of commitment was founded upon the false suggestion, that the Defendant was detained in Worcester gaol by virtue of the two writs of attachment. This objection at the utmost could affect nothing but the order of commitment; but the argument appears to me altogether fallacious. The Defendant was attached for want of an answer. The order of the 21st of February changing the custody from Worcester gaol to the Fleet, proceeded upon the last-mentioned attachment, and upon that only: but the Defendant was turned over to the Fleet cum causis, in order only that all causes for imprisonment other than the attachment might not be affected by the mere change of custody. This objection, therefore, like the former, resolves itself merely into the regularity of the detainer. The return of the warden on the 10th of March, 1842, to which I was referred, cannot alter the case (a). The *question of privilege does not arise here. [*302]

(a) " And by the said sheriff's return, it appears that the Defendant was detained by the said sheriff by virtue of a writ of attachment issuing out of the Court of Chancery, dated the 20th of November, 1841, for not appearing to a bill of complaint of Wil-

 1842.—Appleby v. Duke.

In order that the precise ground upon which I proceed may be understood, I shall add, that the case might have required a different consideration, if the attachment for want of an answer had itself depended upon the Defendant being lawfully in custody at the time it issued: but that was not so. The first process, which was clearly regular, was exhausted, and the process for want of an answer was regularly commenced also. That I understand to be the distinction upon Lord *Cottenham's* judgment in *Lewis v. Evans*. Lord *Langdale* had ordered the Defendant to be turned over to the Fleet, and an appearance to be entered for him after the time limited by the statute for doing so had expired. And the attachment, for want of an answer, which Lord *Langdale* thought a valid detainer, was founded upon the previous irregular process. My only doubt upon that case would have been, whether Lord *Langdale's* order for entering the appearance ought not first to have been discharged. This appears, in some of the cases, to have been held necessary.^(a)

Affirmed, by the Lord Chancellor, on appeal, May 7th, 1842.

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*APPLEBY v. DUKE.

January 26, and 31.

The provisional assignee of the Insolvent Court, made a Defendant in a cause in respect of his interest in the property of an insolvent debtor assigned under the statute, is in the same situation with respect to costs, as the insolvent debtor himself would have been; and, therefore, on a bill of foreclosure, the mortgagor being an insolvent debtor, and the equity of redemption vested in the provisional assignee, the provisional assignee is not entitled to his costs from the Plaintiff. [1]

JAMES DUKE conveyed certain premises and rent-charges to the

liam Woodward; and also by virtue of another writ of attachment, dated the 27th of January, 1842, for not answering such a bill of complaint."

(a) See 1 Daniell's Ch. Pr. 657.

[1] This case was affirmed by the Lord Chancellor. See 1 Phil. 272. In *Clark v. Wilmot*, 1 Y. & C. 55, the Vice Chancellor decided that an official assignee dis-

1842.—Appleby v. Duke.

Plaintiff by way of mortgage, to secure the sum of 1500*l.* and interest; and afterwards by his will devised the same to his son *Jonathan Marshall Duke*, and two other persons, upon trust for sale, and after making certain payments thereout, upon trust, to distribute the same equally between the nine children of the testator, including *Jonathan Marshall Duke*. *James Duke* died: the three devisees were also his executors. The plaintiff filed his bill for foreclosure, against the devisees and executors, and the other eight children of the testator. After the defendants appeared, but before answer, *Jonathan Marshall Duke* applied for the benefit of the act for the relief of insolvent debtors, and his real and personal estate were by order of the Court (under the act 1 & 2 Vict. c. 110, s. 37,) vested in the provisional assignee. The Defendant *Samuel Sturgis*, the provisional assignee, was then made a party by supplemental bill.

The Defendant *Samuel Sturgis*, by his answer, said that it appeared by the records of the Insolvent Court, that an insolvent debtor named *Jonathan Marshall Duke* had petitioned the Court, and had in his schedule set forth a statement, purporting to be an account of his freehold, copyhold and leasehold property, [as therein mentioned]; that the estate of the insolvent was by the order of the Court vested in the Defendant, as the provisional assignee of the estate and effects of insolvent debtors in England, his successors and assigns, in trust for the creditors of the insolvent; that no sub-assignee *of the estate of the said insolvent debtor [*304] had been appointed, and the Defendant was therefore advised, and submitted that such estate and effects of the said insolvent debtor were vested in the Defendant as such provisional assignee: nevertheless, he did not claim any interest therein, or in the matters in question in the suit, save such as might be vested in him as such provisional assignee, in trust for the said creditors, whose rights and interests he submitted to the care and protection

claiming all interest in the suit, may be dismissed at the hearing with costs, to be paid to him by the plaintiff, but in such case he must disclaim absolutely, either by his answer or at the bar. Lord Lyndhurst reversed the decision of the Vice Chancellor. 1 Phillips, 276.

 1842.—Appleby v. Duke.

of the Court: that he was a stranger to all other the matters in question, and he submitted to act as the Court should direct, upon being indemnified, and paid his costs, charges and expenses. And the Defendant said, that he had not received any assets of the said insolvent debtor, wherewith to pay any of such costs, charges and expenses.

Mr. *Chandless*, for the Plaintiff.

Mr. *Reynolds*, for the Defendant *Sturgis*, the provisional assignee, claimed his costs, and cited *Peake v. Gibbon* (a), *Woodward v. Haddon* (b), *Boswell v. Tucker* (c). The provisional assignee is a public officer, and in that capacity is a defendant in numerous suits, in which he is necessarily ignorant of the value of his rights, and cannot venture to disclaim all title, until he has had time to make inquiries, without endangering the interests of the creditors whom he represents: his costs must be borne by the parties, for whose benefit he is brought before the Court, or in this case as in many others, where there is no estate belonging to the insolvent, such costs would fall on himself personally, a consequence against which the Court will protect him. The provisional assignee

from his situation is precluded from refusing to accept [*305] the estate, however worthless it may be. The execution of the law relating to insolvents, of necessity, casts the estate upon him: this materially distinguishes him from other assignees, or from devisees who can repudiate the trust or disclaim without affecting the interests of others. In this case moreover, there is no proof of any insufficiency in the mortgaged estate, or that the provisional assignee has ever refused to execute a release of the equity of redemption.

Mr. *Smythe*, for the other defendants.

Mr. *Chandless*, in reply, mentioned *Clark v. Wilmot* (d).

(a) 2 Russ. & Myl. 351.

(b) 4 Sim. 606.

(c) 1 Beav. 423.

(d) 1 Y. & Coll. C. C. 53.

 1842.—Appleby v. Duke.

VICE-CHANCELLOR:—

This is a bill by a mortgagee, for foreclosure, against an insolvent mortgagor, whose interest in the equity of redemption has become vested in the Defendant, *Sturgis*, the provisional assignee. It is admitted, that a decree of foreclosure must be made; and the only question is whether the costs of the provisional assignee are to be paid by the mortgagee,—he being allowed to add them to his debt?

The provisional assignee has not disclaimed, but has filed an answer and that answer made it indispensably necessary that the Plaintiff should bring the cause to a hearing against him. In fact, it has been argued at the bar, on behalf of the provisional assignee, that having regard to his duties, he ought not to disclaim until he has ascertained whether the estate is worth redeeming or not,—a proposition which I am not called upon to consider, having in this case only to decide whether, if the provisional assignee incurs costs in ascertaining the fact, he is entitled to be reimbursed those costs by the mortgagee. The mortgagee objects to pay the costs [*309] of the provisional assignee, even upon the terms of being allowed to add them to his debt; for he alleges, that he has already advanced as much money upon his security as the security is worth, and that the Court ought not, in justice, to compel him, against his will, to increase the amount of his advances. Whether the suggestion that the security is not more than sufficient to pay the debt is well or ill founded, I have no opportunity of knowing; nor is it a point into which the Court can inquire at the hearing of a foreclosure suit. It is enough for me to know that the suggestion at the bar may be true, in order to oblige me to decide the question raised by the provisional assignee in this case, which I must endeavour to do, with regard both to principle and precedent.

Now, in principle, there can be no doubt as to the decree I ought to make. The estate at law belongs to the mortgagee, notwithstanding the insolvency. In this Court, it would belong to the mortgagor, if solvent, but only upon terms of his paying to the mortgagee his principal, interest, and costs. It is clear, that the mortgagor, if solvent, could not compel the mortgagee to do that which the provisional assignee asks, nor could an assignee for value, nor an assignee in bankruptcy,

 1842.—Appleby v. Duke.

although in that case the proceeding is in invitum. Upon what principle, then, can the mortgagor, by a voluntary proceeding of his own, in claiming the benefit of the Insolvent Debtors' Act, vary the ordinary rights of the mortgagee by rebuiring him, in effect, to make a further advance upon the security in the shape of a payment in respect of the costs of the provisional assignee? How could such a principle as that which is insisted upon be applied, if as might happen, the mortgagee was also insolvent? On principle, I am satisfied that

I cannot give the provisional assignee the costs which he claims.

[*307] "Authorities, however, have been referred to, by which, if they stood alone, I should probably consider myself bound: *Peake v. Gibbon* (a); *Woodward v. Haddon* (b); *Weaving v. Count* (c); *Boswell v. Tucker* (d). But these cases do not stand alone. I was so well satisfied that they could not be supported upon principle, that, in *Hunter v. Pugh*, before Lord *Cottenham*, (the last case upon the subject of which I am aware), I resisted (and successfully) the claim of the provisional assignee to his costs, —a claim which, in that case, was urged upon the same grounds, and on the same authorities, as in the argument before me in the present case. I then understood Lord *Cottenham* to express a decided disapprobation of the cases cited at the bar. He thought that successive Judges had deferred to the judgment of those who had preceded them, without approving the decisions which they followed; and he said he was not bound by those cases, and would not follow them (e).

(a) 2 Russ. & Myl. 354.

(b) 4 Sim. 606.

(c) 6 Sim. 439.

(d) 1 Beav. 493.

(e) *HUNTER v. PUGH*, L. C., Dec. 9th, 1839; March 7th, 1840.—*W. Macken* devised certain freehold premises to the Defendant, *Pugh*, upon trust, after paying legacies, to pay the residue of the rents to *Rebecca Peacock* for her life, with remainder to her children in equal shares; and, in default of such issue subject to certain other legacies, "upon trust to pay and transfer all the remainder of the said property to *W. Hinds*, his executors or administrators, to whom, in default of such issue of *Rebecca Peacock*," the testator gave and bequeathed the same. *W. Hinds* became bankrupt during the lifetime of *Rebecca Peacock*, and his interest in the premises was sold by his assignees, and purchased by the Plaintiffs. *Rebecca Peacock* was the heiress at law of the testator: she intermarried with *W. Anderson*, and died without

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"Unless it is to be assumed, that a mortgage security [*308] in all cases exceeds the amount of the mortgage debt, I cannot, in principle, distinguish the case of *Hunter v. Pugh* from the case before me. I may observe, moreover, that (unless *Sir J. Leach* is an exception) no Judge before whom the point has been argued appears to have been satisfied of the propriety of allowing the claim; and *Sir J. Leach* was not uniform in his decisions (a).

issue. *W. Anderson* took the benefit of the insolvent act, and his estate was assigned to the provisional assignee. The bill stated a settlement made on the marriage of *Anderson* with *Rebecca* his wife, reciting that *Macken* had died intestate as to the premises in question, and that *Anderson* and his wife had levied a fine thereof to the use of the Defendant, *Pugh*, upon certain trusts: the bill also stated that, under the settlement, the Defendant, *Samuel Sturgis*, claimed; and that others of the Defendants claimed some derivative interests from *Anderson* and his wife; and the bill prayed a conveyance from *Pugh*, and the delivery up of the settlement. The answer of *Samuel Sturgis* was precisely in the same form as in the above case of *Appleby v. Duke*, except that it did not state that he had received no assets of the insolvent.

Dec. 9th, 1839.—The Lord Chancellor, after argument on the construction of the will, declared that *W. Hinds*, in the events which had happened, took an estate in fee in the premises, and he directed the settlement to be delivered up, if in *Pugh's* possession, and that *Pugh* should convey the premises to the Plaintiffs on payment of his costs.

*Mr. Reynolds**, for the Defendant, *Sturgis*, required that his costs should be provided for; and cited *Peake v. Gibbon*, 2 Russ. & Myl. 354.

Mr. Wigram and *Mr. Elderton*, for the Plaintiff, contra.

The Lord Chancellor.—The way would be, not according to that case, but that the Plaintiff should pay the assignee's costs, and have them over.

Mr. Reynolds.—The Master of the Rolls has considered himself bound by that case.

The Lord Chancellor.—I am not bound by it; but, at the same time, if there is an established rule, it perhaps should not be altered. I must inquire as to the practice, and what has been done in the other branches of the Court.

Mr. Reynolds mentioned *Woodward v. Haddon*, 4 Sim. 608, and *Weaving v. Count* 6 Sim. 439.

March 7th, 1840.—The Lord Chancellor decided that the provisional assignee could not have his costs.

(a) *Collings v. Shirley*, 1 Russ. & Myl. 638: considered in *Thompson v. Kendall*, 9 Sim. 397.

* The note of what passed in Court was given by *Mr. Craig* to the Vice-Chancellor.

 1842.—Cash v. Belcher.

I do not think the sufficiency or insufficiency of the assets of the insolvent to reimburse the provisional assignee his costs of the suit ought to make any difference in the case. The ground of my decision, founded on *Hunter v. Pugh*, is that the provisional assignee stands in the position as the insolvent; neither can have a right to impair the same curity of the creditor by increasing the charge upon the property.

I observed, at the outset, that the provisional assignee had not disclaimed; I do not mean by that expression to intimate any opinion, if he had disclaimed, that circumstance would have affected my present decision. The mortgagee has a right to retain his security unimpaired until he has been repaid his principal, interest and costs. It may be proper that the legislature should make provision for cases like these; but I cannot accede to the proposition, that the mortgagee of the property of the insolvent is the proper party to pay the provisional assignee the costs of protecting the insolvent's estate.

If the assignee considers himself aggrieved by this decision, he may obtain a reviewal of it by appeal, although it relates to costs only; for the decision professes to proceed upon a general principle, not requiring an investigation of the merits of the case (a).

AN appeal against this decision has been made to the Lord Chancellor. Vide *Appleby v. Duke*, n. infra.

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*CASH v. BELCHER.

January 31, February 8.

The official assignee and the creditor's assignees of a bankrupt, who are necessary parties to a suit for foreclosure in respect of their interest in the equity of redemption of premises of which the bankrupt was the mortgagor, and which are an insufficient security for the amount of the mortgages thereon, are not entitled to their costs of the suit from the Plaintiff.

By indentures of lease and release, dated the 15th and 16th of

(a) *Angell v. Davis*, 4 Myl. & Cr. 361; *Taylor v. Southgate*, Id. 203; *Eyre v. Marsden*, Id. 231.

1842.—Cash v. Belcher.

January, 1838, *Leonard Wild Lloyd* conveyed certain freehold premises, to the Plaintiffs in fee by way of mortgage, to secure 1,750*l.* and interest. On the 24th of January, 1838, *Lloyd* made a second mortgage of the same premises to the Defendant, *Flight*, to secure 1,201*l.* 10*s.* 9*d.* and interest. In March, 1840, *Lloyd* became bankrupt, and the Defendant, *A. B. Belcher*, was appointed official assignee, and the Defendants, *Tucker* and *Winsland*, were chosen creditor's assignees under the bankruptcy. On the 14th of April, the solicitors of the Plaintiff wrote to the solicitor for the assignees, stating that the Plaintiffs required payment of the money due on their mortgage, or that a bill of foreclosure would be immediately filed. This letter was received by the assignees, or their solicitors, on the 15th or 16th of April; and they replied to it on the 20th of April, by requesting that the filing of the bill might be delayed for a short time, as they had not been able to obtain information of the value of the property. On the 18th of April, before the application for delay, the present bill of foreclosure was filed against the assignees and the second mortgagee.

The assignees, by their answer, in July, 1840, said they were informed that the value of the mortgaged premises was sufficient to satisfy the debt of the Plaintiffs, but not to satisfy also the sum due to *Flight*, the second mortgagee; and they said that they (the assignees) did not claim any estate, right, or interest in the mortgaged premises, or any part thereof; that "if [*311] they had been applied to for that purpose, they would have released or conveyed the equity of redemption in the same, but no such application was made to them; that they had received no estate or effects of the bankrupt applicable to the payment of any dividend to the creditors of the bankrupt, or to the costs of prosecuting the fiat in bankruptcy, or the costs of this suit: and they claimed to be paid their costs of the suit.

Mr. *Steere*, for the Plaintiffs.

Mr. *F. Bayley*, for the assignees, claimed to be paid their costs, (citing *Thompson v. Kendall* (a), *Woodward v. Haddon* (b), and

(a) 9 Sim. 397.

(b) 4 Sim. 606.

1842.—Cash v. Fletcher.

Clark v. Wilmot (a) ; or, at least, the costs of the official assignee, who is merely performing a public duty.

Mr. *Wood*, for the Defendant, *Flight*, the second mortgagee, objected to any decree which, by giving the assignees their costs, should permit the Plaintiffs, as the first mortgagees, to add them to their debt, and thereby increase the charge which was prior to that of the second mortgagee : *Barry v. Wray* (b).

VICE-CHANCELLOR :—

The Plaintiff is the first mortgagee of the property in question in the cause. The Defendants may, with sufficient accuracy for the present purpose, be described as of two classes,—the second mortgagee,—and the official assignee of the mortgagor, who since the execution of the mortgages has become bankrupt. The suit is an ordinary foreclosure suit ; and the only question I have “to decide [*312] is this—who ought to pay or bear the costs of the official assignee of this suit ?

In the case of *Appleby v. Duke* (c), I had occasion to consider and decide the question, whether the provisional assignee of an insolvent mortgagor, who is made a defendant to a common foreclosure suit, is entitled to his costs of suit against the mortgagee ; and, upon the authority of *Hunter v. Pugh* (d), I decided that he was not so entitled. In *Appleby v. Duke*, and in *Hunter v. Pugh*, the provisional assignee had not disclaimed. In the case now before me, the official assignee has disclaimed in this sense only : he says that the estate is mortgaged for more than its value, and that he therefore disclaims all title and interest in it, and says he would have released it if an opportunity had been afforded him. It is obvious that a disclaimer of this nature does not shew that the official assignee was not a necessary or proper party to the suit at the time the bill was filed ; and if he were properly made a party to the bill, the principle upon which I decided *Appleby v. Duke* will apply to the costs of the official assignee up to the time of filing, and including, the disclaimer.

(a) 1 You. & Coll. C. C. 53.

(b) Beames on Costs, App., p. 392.

(c) Ante, p. 303.

(d) Ante, p. 302, n.

1842.—Cash v. Belcher.

But it was argued for the official assignee, that he was entitled to his costs of being brought to a hearing after he had disclaimed, and cases were referred to in support of his claim to be allowed those costs. I do not deny that there are cases in which a defendant who disclaims may be entitled to claim his costs of suit, if brought to a hearing,—as where, by the disclaimer, it appears he was not originally a necessary or proper party to the suit; but I cannot apply such a rule, as of course, to a case in which the defendant was originally a necessary or proper party. The Plaintiff in this cause *must either have dismissed the bill against this Defendant,—the of- [*313] ficial assignee,—with costs upon the disclaimer being filed, or have brought him to a hearing; and unless the case appears to be one in which it was obligatory upon the Plaintiff to pay the official assignee his costs upon the disclaimer being filed, I cannot hold that he did wrong in bringing the cause to a hearing against him. He had no other alternative, unless he had paid costs which, in my judgment, he ought not to be required to pay. I acted on this principle in *Fewster v. Turner* (a), and in *Perkins v. Bradley* (b); and I see no reason for changing my opinion upon the principle.

It was, however, further urged for the official assignee, that the proceedings which took place immediately before the bill was filed made it improper in the Plaintiff to make the provisional assignee a Defendant in the suit.

[His Honor adverted to the letters, and the time of institution of the suit, and remarked that the costs to which the official assignee might be subjected in this suit appeared to have been occasioned by some precipitancy in filing the bill.]

This part of the case, however, is not before me with sufficient distinctness to make me feel justified in acting upon it in giving the costs of the official assignee personally against the Plaintiff, which I should be obliged to do, if I held, that the bill was improperly filed against the official assignee; for I could not in that case allow the Plaintiff to add such costs to his mortgage, as that would operate to

(a) Dec. 18, 1841. Not reported.

(b) *Ante*, p. 219.

 1842.—*Clare v. Wood.*

the prejudice of the second mortgagee, whose security is already insufficient. The usual decree must be made.

[*314]

*CLARE *v.* WOOD.

February, 18 and 19.

The 43rd order of August, 1841, allowing exhibits to be proved by affidavit, instead of *viva voce* at the hearing, does not dispense with the practice of obtaining the order of leave to prove the exhibit at the hearing, but that order may be obtained after the affidavit has been made.

THE object of the suit was to give effect to the charge acquired by a judgment creditor, upon the estate of the debtor, under the stat. 1 & 2 Vict. c. 110, s. 13.

Mr. *Kenyon Parker*, and Mr. *Parry*, for incumbrancers on the estate, tendered in evidence a bond, on which their charge was founded, and instead of proving the bond, by calling a witness *viva voce*, an affidavit was produced, and offered to be read, for that purpose, under the order XLIII of August 1841.

It was objected that an order for liberty to prove the deed by affidavit was necessary, according to the old practice of obtaining an order for liberty to examine a witness *viva voce*.

VICE-CHANCELLOR:—

The practice was to obtain an order giving liberty to prove a document *viva voce*, but the attendance of the witness, for that purpose, was in fact a mere form; the examination was perfectly private, and took place between the registrar and the witness, with-

1842.—Collins v. Brown.

out any opportunity of cross-examination (a). It was therefore considered to be equally satisfactory, and at the same time often a means of saving expense, to allow a party to give the same evidence by affidavit which he might give by the personal attendance of the witness, to prove a document viva voce, at the hearing. This order was not intended to disturb any other part of the practice, and it is thereby still necessary, as heretofore, to obtain an order allowing the document to be proved at the hearing (b).

COLLINS v. BROWN.

May 24, 25.

The 8th order of August, 1841, is not imperative: a Plaintiff may notwithstanding proceed, according to the old practice, to enforce appearance by attachment.

THE Defendant not having appeared to the bill, the Plaintiff, instead of proceeding to enter an appearance under the Order VIII. of August, 1841, issued an attachment, on which the Defendant was taken; and the Defendant being in custody under the attachment, the Plaintiff now, according to the old practice, moved for the habeas corpus. The registrar, doubting whether the Order VIII. had left it within the option of the Plaintiff to proceed according to the old practice, required the motion to be mentioned to the Court.

Mr. *Cameron* moved accordingly.

THE VICE-CHANCELLOR said, that the 8th order did not take away the right of the Plaintiff to proceed by attachment: it had been suggested, that the Master of the Rolls had expressed an opinion that the order was imperative; but it appeared that he had not expressed any such opinion: on the contrary, he considered it not imperative.

The order was made.

(a) *Vide*, p. 132.

(b) The order was afterwards obtained.

1842.—Taylor v. Jardine.

[*816]

*TAYLOR v. JARDINE.

1842: May 27th.

The form of the decree, on dismissal of a bill with costs, ordered to be altered by adding the words "*to be paid by the Plaintiffs*,"^a with reference to the 1st order of the 10th of May, 1839, giving a remedy by fieri facias or elegit for costs ordered to be paid.

THE bill in this cause was, at the hearing, ordered to be dismissed as against all the Defendants, except *Jardine* and his wife, with costs. The minutes of the decree delivered out in the usual form upon such a judgment, were as follows:—"And let the Plaintiffs' bill stand dismissed out of this Court as against all the Defendants, except the Defendant, *William Jardine*, and *Sarah* his wife, with costs to be taxed by the said Master."

Mr. *Sharpe*, for the Defendant, as against whom the bill was ordered to be dismissed, applied to the Court, on the minutes, that the words "and paid by the Plaintiffs" might be added. The decree, in the common form, would be a constructive order that the Plaintiff should pay, and, under that order, the subpoena for costs always issued, but the Defendants were entitled to the remedy for their costs given them by the orders of the 10th of May, 1839, made in pursuance of the act 1 & 2 Vict. c. 110, ss. 18, 20, by which they are enabled to sue out writs of fieri facias or elegit for the amount ordered to be paid (a).

Mr. *W. T. S. Daniel*, for the Plaintiffs.

[*817] *The VICE-CHANCELLOR said, he had no doubt that the common form was a constructive order for payment: the

(a) See Forms of Writs, (appended to the orders of the 10th of May, 1839, Beavan Ord. Can. p. 145), No. V., Writ of Fieri Facias for costs. The writ is framed for giving interest on costs. The *Vice-Chancellor of England* said, that this form of proceeding, giving interest on costs, did not apply where costs were ordered to be paid, not by a party personally, but out of an estate: *Attorney-General v. Nethercoat*, Jan. 26, 29, 1841, MS.

 1842.—*Gibson v. Haines.*

addition was, however, proper to bring the case within the terms of the orders of the 10th of May, 1839; but the additional words, being new in point of practice, the order for introducing them would more properly proceed from the *Lord Chancellor*, if he should think the addition ought to be made.

The application was made before the *Lord Chancellor*. The *Lord Chancellor* was of opinion that the common form was a constructive order to pay; but he ordered the words "and paid by the Plaintiff" to be added, and said that the same form of expression should be used in proper cases in future.

 GIBSON v. HAINES.

February 24. March 14, 15.

The affidavit of service of the copy of the bill, under the 23rd order of August, 1841, on the motion for leave, to enter the memorandum of service, under the 24th order, must shew that in the copy served the interrogating part was omitted.

The prayer, under the 23rd order, "that the Defendant, upon being served with a copy of the bill, may be bound" &c., will be required to be inserted in the prayer of process.

MOTION, under the order XXIV. of August 1841, for leave to enter the memorandum in the Six Clerks office, of the service of the copy of the bill: the affidavit did not state the service of the copy, "omitting the interrogating part" (a).

"THE VICE CHANCELLOR said, it must appear that the [*318] interrogating part was omitted.

(a) See *Blew v. Martin*, ante, p. 151. The affidavit should state that the Defendant is not an infant: *Goodwin v. Bell*, 1 You. & Coll., C. C., 181. In a subsequent case before the *Lord Chancellor*, (not reported), it is said to have been considered unnecessary to state that the Defendant is not in infancy, or not under any other disability. The nature of the suit must appear: *Haigh v. Dixon*, 1 You. & Coll., C. C., 180; this need not be on the affidavit, but may be stated at the bar.

1842.—Gibson v. Haines.

An objection was made in the Six Clerks office, on the ground that the prayer in the words of the order XXIII. "that the defendant upon being served with a copy of the bill, may be bound by all the proceedings in the cause," was not inserted in the prayer of process. These words were inserted before the prayer for general relief.

Mr. *Romilly* was instructed by the Six Clerks to submit to the Court, that the form of the bill was not in compliance with the order. The orders plainly contemplated that the defendant to be served should be substantially a party : he might appear, and might become an active party. But no person is deemed a party unless his name is in the prayer of process, and the prayer of process is always referred to in the offices, as shewing who are the parties to the suit. If this prayer be not inserted in that part of the bill, the Six Clerks will be required to look through the whole record, to discover who are the parties.

Mr. *Bilton*, for the motion.

The VICE CHANCELLOR said, that the order was complied with, and the memorandum must be entered.

Application to the *Lord Chancellor* was made by Mr. *Romilly* on the same point. The *Lord Chancellor* directed the memorandum to be entered, but said, that the convenient course would be, to require this particular prayer in future bills to be inserted in the prayer of process.

1482.—*Massey v. Moss*.

*MASSEY v. MOSS.

[*319]

May 7, 26, 27.

In a creditor's suit, the assignees of a bankrupt, who is a defaulting executor of the deceased debtor, are not entitled to their costs of the suit out of the testator's estate; but if the Plaintiff sought to charge the assignees with the receipt of specific parts of the testator's estate, and failed to do so, the assignees might be entitled to costs.

A CREDITOR'S suit: on further directions. One of the executors was found in default, and had become bankrupt; his assignees were defendants. The decree had directed an inquiry of the testator's estate (if any) come to their hands since the bankruptcy: no part of the estate was found to have been received by the assignees (a).

Mr. *Anderdon* for the assignees, claimed their costs. The distinction taken between this case, and those in which the provisional and official assignees had been refused their costs, is considered in the judgment.

Mr. *Gridlesone*, Mr. *Elmsley*, Mr. *Follett*, Mr. *Terrell*, and Mr. *Blozam*, appeared for other parties.

The estate being more than sufficient to pay specialty creditors, and being insufficient to pay both creditors by specialty and by simple contract, the creditors by specialty and the family of the testator, entitled under his will, did not contest the question of costs of the assignees.

VICE-CHANCELLOR :—

In the cases of *Appleby v. Duke*, and *Cash v. Belcher*, I decided upon the authority of *Hunter v. Pugh*, that the assignees

(a) This case is reported out of its order in point of date, from the similarity of the question to that discussed in *Appleby v. Duke*, and *Cash v. Belcher*, ante. pp. 303, 310.

 1842.—*Massey v. Moss.*

[*320] of an insolvent or bankrupt mortgagor, *defendants in a suit of foreclosure, were not entitled to their costs of suit as against the mortgagee, however they might be entitled to retain such costs, out of the estate (if any) of the insolvent or bankrupt, and these cases have not been disturbed. The case of *Barry v. Wray* (a) confirms this view.

It has been argued however that the principle upon which I proceeded in those cases where the assignees were brought before the Court for their own benefit, in respect of an interest they had or claimed in the estate, does not apply to the present case, in which the assignees are made parties purely for the benefit of the Plaintiff, in order that the Plaintiff may establish the amount of his claim against the bankrupt's estate, to be afterwards recovered by proof under the bankruptcy. And it was said, that in such cases, the practice of the Court was, to give the assignees their costs out of the testator's estate. To shew that no such general rule can exist, it must be sufficient to put the case of the estate of a bankrupt executor, which should leave a surplus for the bankrupt, after paying twenty shillings in the pound. It is clear that, in such a case, the estate of the testator ought not to pay the costs of so much of the suit as may have been occasioned by the executor's default. *Tebbs v. Carpenter* (b). Yet such would be the effect of the general rule which is contended for. The rule of the Court, as far as my recollection of the practice goes, has been to allow the assignees to retain their costs out of the bankrupt's estate, if there be any estate, a rule that obviously approaches more nearly to the justice of the case than that which is suggested. For, however it

[*321] might be harsh to make assignees pay *costs in a suit like the present, (a course which is not proposed), I cannot understand upon what principle they should receive their costs of a suit, the object of which is, to repair losses occasioned by the default of the party whom they represent, and in whose place they stand. It was said, however, that there are no assets of the bank-

(a) Beames on Costs, App. p. 392. Where the *Mortgages* assigns, after decree, see *Barry v. Wray*, 3 Russ. 465.

(b) 1 Madd. 308.

 1842.—Ottey v. Pensam.

rupt, out of which the assignees can indemnify themselves, and that in such a case at all events they should receive their costs in a suit like the present. If the law were so, a special application by the assignees would be necessary, in order to satisfy the Court that the facts were such as to bring the case within the rule. But I am satisfied that there is no such rule. In *Williams v. Nixon (a)*, Lord Langdale expressly decided the contrary, and the opinion of another branch of the Court accords with that opinion, as it does with my own. In *Appleby v. Duke*, and *Cash v. Belcher*, I proceeded upon the principle that assignees for a purpose like the present stand in the same situation as any other party; and the registrars also inform me, that they consider my view of the practice to be correct. I cannot therefore give the assignees their costs.

To prevent misapprehension, I think it right to observe that, if costs had been incurred by an ineffectual endeavour of the Plaintiffs to charge the assignees personally, as having possessed a specific part of the testators's estate, the costs of so much of the suit as were occasioned by such attempt, might deserve a different consideration. No distinction has been desired in respect of any costs actually so occasioned.

 *OTTEY v. PENSAM.

[*322]

April 19 and 24.

Where a report of the Master requires confirmation and further directions by the Court to give it effect, a petition in the nature of exceptions to the report cannot be heard, unless objections have been taken before the Master to the draft of the report.

By an order made the 7th of November, 1840, upon the petition of *James Burton*, who was the solicitor of the original Plaintiff, and was not a party in the cause, it was referred to the Master to inquire and state whether the petitioner *James Burton* had a lien for

(a) 2 Beau. 477.

 1842.—Ottey v. Pensam.

any and what costs upon a fund which had been paid into Court to the credit of the cause. The Master reported that the petitioner had a lien upon the fund for his costs, and that he had taxed such costs at 73*l.* 9*s.* *J. Burton* presented his petition, praying that the report might be confirmed, and the amount of the costs ordered to be paid. The parties to the suit, interested in the fund, presented a cross-petition, praying that it might be declared that *J. Burton* had not any lien on the fund, or that the case might be referred back to the Master.

Mr. *Sharpe* and Mr. *Weld*, for the petitioner *J. Burton*, submitted that the cross-petition was irregular, inasmuch as it was in the nature of an exception to the report, and no objections to the draft report had been carried in before the Master. On the necessity of taking objections to the draft report, as well where the matter was brought before the Court by petition, as where it was in the form of exceptions, they cited *Daniell's Chanc. Pr.* Vol. 2, p. 942 et seq.; *Smith's Chanc. Pr.* Vol. 2, p. 165, ed. 2; *Turn. & Ven. Chanc. Pr.* Vol. 2, p. 225; *Drever v. Maudesley* (a), *Taylor v. D'Eguille* (b), *Brodie v. Barry* (c). Objections are not always necessary even where the subsequent proceeding is by exception, [*323] nor is the practice of requiring objections confined to those cases. The test of the necessity of objections is the issue of the warrant giving the parties notice of the signing of the report, and affording them the opportunity of objecting.

Mr. *Anderdon*, in support of the cross-petition, insisted that it had never been the practice to require objections, unless the report was to be excepted to, and that the language of the books of practice so expressed the rule.

 VICE-CHANCELLOR :—

After argument of the objection to the cross-petition, I directed

(a) 7 Sim. 240.

(b) Id. 445.

(c) 1 Jac. & W. 470.

 1542.—Ottey v. Pensam.

this matter to stand over, in order that I might ascertain what the practice is. Upon principle there can be no doubt of what it ought to be. Of the various duties, the execution of which the Court is in the habit of committing to the Master, there are some, the completion of which is wholly committed to the Master, so that his report or certificate requires no confirmation by the Court to give it effect. With respect to others the report of the Master has no operation without the subsequent confirmation or further direction of the Court.

Without respect to those certificates, or reports in the nature of certificates, which do not require confirmation, the Master issues^{*} no warrant on preparing them, and the only way of obtaining the opinion of the Court upon such a proceeding, is by petition, praying either that the conclusion of the Master may be reviewed by the Court, or for leave to except to the report, as in *Russel v. Buchanan* (a).

*With respect to those reports which require confirma- [*324] tion, there is a difference in practice as to the modes of confirming them, and of objecting to their confirmation : this difference depends upon the nature of the proceeding upon which the order of reference was made. If it was made by the decree or order of the Court at the hearing of the cause, or upon further directions, the proceeding to confirm the report is by a motion nisi ; but where the order of reference was made upon motion or petition, the regular mode of confirming the report appears to be by motion or petition absolutely. In the former case the way to obtain the opinion of the Court upon the report, if complained of, is by filing exceptions to it ; but the only way of obtaining the same end in the latter case, is by presenting a petition in the nature of an exception to the report. The question whether the report of the Master is final without the subsequent confirmation of the Court, or whether it requires such confirmation to make it effective, necessarily depends upon the terms of the order, or the nature and subject matter of the reference, and not on the proceeding upon which the order of reference was made.

So far I believe the practice of the Court to be free^{*}from doubt

(a) 9 Sim. 167.

1842.—Ottey v. Pensam.

or difficulty. It is equally clear that when the report is to be confirmed by order nisi, no party can except to the Master's report who has not carried in objections to the draft report; and the only question I have to consider is, whether a petition in the nature of an exception to a report requiring confirmation and further directions, which, if made in pursuance of a decree, would require objections as a foundation for exceptions, can be sustained in point of regularity, unless objections were taken to the draft of the report.

[*325] In principle, as I have already observed, there can be no doubt as to what the answer to this question ought to be, unless the objections which are required in the ordinary case are a useless form. But it is not so. The objections are in the nature of a pleading. They inform the Master of the point in respect of which his draft report is objected to, and they insure the same question only being brought before the Court when the report is reviewed. Without this safeguard there would be constant confusion and uncertainty. Still, however, the question is one of practice, and, to ascertain the practice, has been the object of my inquiries since the argument. The books of practice furnish no certain information upon the subject, except so far as the practice in this case may be inferred from the practice in the common case. The authorities are equally unsatisfactory.

In *Brodie v. Barry* (a), it appears that objections had been taken to the draft report. The case of *Taylor v. D'Egville* (b) does not apply. I conceive it to be clear that a person, not a party to a cause, cannot object or except to a report, without the permission of the Court. But the question here is, whether (where a person who, though not a party to the cause, has obtained the leave of the Court to prosecute his claim upon motion or petition) the Master's report can be complained of by petition or otherwise, unless there have been previous objections to the draft report. I conceive Mr. *Burton's* position to be precisely the same, for the present purpose, as that of a party in the cause, who has obtained a similar reference upon motion or petition.

With respect to the course usually pursued, I believe there is

(a) 1 Jac. & Walk. 470.

(b) 7 Sim. 445.

 1842.—*Ottey v. Pensam*.

want of uniformity. But I think I am right in *say- [*326] ing that the Court has never sanctioned the proposition, that the confirmation of a report like this can be resisted, unless the attention of the Master has been directed to the matter by objection. From the inquiries I have made I am satisfied that my first impression was right, in thinking that, in point of regularity, objections ought to have been taken to the draft report. I think this would be the proper course if Mr. *Burton* were a party to the record; and I think the circumstance that he is not a party to the record, can make no difference after the Court has made an order in the cause letting him in to prosecute his rights in the same manner as if he were a party. I believe I may add, that this conclusion would have been come to, as matter of strict practice, in any branch of the Court before which the point had arisen.

The observations which I have made do not, of course, apply where the error of the Master is apparent upon the face of the report. Exceptions in that case are unnecessary: *Adams v. Claxton* (a).

No party can be injured by the practice I now adopt; for with respect to all reports, which strictly depend for their efficacy upon their subsequent confirmation by the Court, the Master issues his warrant on preparing his report; and I am informed that that course was taken in the present instance. If the parties who have *presented the cross-petition desire it, I will enter- [*327] tain an application by them for leave to carry in objections; but I cannot make an order for that purpose without a special application, because it has been stated, that, in the Master's office, the objections now taken were deliberately abandoned.

(a) 6 Ves. 226. In a reference to take the accounts of an estate at the suit of specialty creditors, one of the executors claimed to retain the amount of simple contract debts, which he alleged that he had paid without notice. The Master, on this point, found only that the executor had, by his affidavit, deposed &c., [alleging the retainer]. Mr. *Terrell*, for the executor, who had not excepted, claimed to have the amount allowed, or the question again referred to the Master. The *Vice-Chancellor* referred it back to the Master to review his report: *Massey v. Moss*, May 7, 9, 1842, reported *supra*, p. 319.

1842.—*Baker v. Duke.*

BAKER *v.* HARWOOD.FENWICK *v.* BAKER.

May 23.

In a suit to administer an estate where inquiries are necessary to ascertain a class of persons beneficially interested, the regular course is, to direct the inquiry as to such persons in the first instance, and not (until that inquiry is answered) to order the Master to proceed to take the accounts. It is only where the circumstances of the case are such as to satisfy the Court that the persons interested are parties to the suit, that the Court will, at the hearing, direct the Master to proceed to take the accounts, if he should find the persons interested are parties.

THE suits were for the administration of the estate of an intestate: one of the suits was by the administratrix, and the other by persons claiming as next of kin. At the hearing,

Mr. *Rolt* submitted, that the decree should direct the Master to inquire whether all the next of kin were before the Court as parties in these suits; and if he should find them to be parties, then that he should go on and take the necessary accounts.

Mr. *Girdlestone* and Mr. *Lowndes*, for the other parties to the cause, did not object to the decree suggested, if it could be regularly made in that form; and if not, they said that the decree should merely direct an inquiry as to the next of kin, and reserve all further directions.

Mr. *Sharpe* appeared for parties, Defendants in one of the suits, who claimed to be sole next of kin.

THE VICE-CHANCELLOR said, that, in an administration [*328] suit, in which inquiries are necessary to ascertain who are the parties beneficially interested in the estate, it is irregular to direct the accounts to be taken until after the inquiries have been made, and the Master has made his report. But where the parties interested are the children of a party to the suit, or are

1842.—*M'Intosh v Great Western R. R. Co.*

persons of a class in such circumstances, that the Court may be reasonably satisfied, at the hearing, that all parties beneficially interested are parties to the record, the Court may, at the time of directing the inquiries, also order that, if the Master shall find that all the persons beneficially interested are parties to the suit, he do then proceed to take the account; that this is, however, in strictness, an irregularity; and the Court will not make the order in that form, unless it be reasonably clear that all the persons interested are parties. His Honor said that he especially noticed the point, because it had so frequently been brought to his attention.

IN this case, all parties desiring it or consenting, the order was made for taking the accounts contingently upon the finding that the parties were before the Court.

M'INTOSH v. GREAT WESTERN RAILWAY COMPANY.

April, 15, 20.

In the number of days for notice of the time and place of examining a witness, an intermediate Sunday is to be reckoned.

An *ex parte* order for the examination *de bene esse* of a witness about to go abroad is regular.

A motion to suppress depositions taken under an order for the examination of a witness *de bene esse*, not asking to discharge that order, is not supported by shewing circumstances from which it would merely appear that the order was irregular; for the Court will assume, for purpose of the motion, that the order was regular.

THIS was a motion to suppress depositions taken under an order obtained by the Plaintiff, dated 19th of March, 1842, ['329] for the examination of a witness *de bene esse*, on the ground that he was about to sail from England on the 26th of March, 1842. The order was served upon the Defendant on the 19th of March, the day on which it was made; and the examination of the witness commenced on the 22nd of March, and con-

1842.—*M'Intosh v. Great Western R. R. Co.*

cluded on the 23rd of March. The 20th of March, one of the intervening days between the notice and examination, was Sunday.

The motion was founded upon two suggestions,—First, that the order of the 19th of March was irregular, for two reasons: 1st, because it was obtained *ex parte*; 2nd, because the affidavit on which it proceeded did not state the particular facts to which the evidence of the witness was intended to apply. Secondly, that three days' notice had not been given to the Defendants of the time and place of examination.

Mr. *Girdlestone* and Mr. *Stevens*, for the motion.

Mr. *Sharpe* and Mr. *Walpole*, contra.

* On the point of regularity *M' Kenna v. Everitt* (a); *Loveden v. Lord Milford* (b); *Hankin v. Middleditch* (c); *Tomkins v. Harrison* (d); and *Daniell's Chan. Pr.* (e), were cited. And on the computation of the time of notice, *Milburn v. Lyster* (f); *Angell v. Wescombe* (g); *Maxwell v. Phillips* (h); *Daniell's Chan. Pr.* (i); and *Archbold's K. B. Pr.* (k).

VICE-CHANCELLOR :—

[*330] The present motion does not seek to discharge *the order of the 19th of March; and I must therefore, upon this motion, consider that order as having been regularly obtained. I notice, however, the objection which has been taken to the regularity of the order for this reason:—In *M' Kenna v. Everitt* (l), Lord *Langdale* decided, that an order to examine a witness *de bene esse*, on the ground that he was about to leave the country, might regularly be obtained *ex parte*. It was said that Lord *Langdale* had since expressed a different opinion, but I do not find that he has done so (m); and as it is most desirable that the practice of the

(a) 2 Beav. 188.

(b) 4 Bro. C. C. 540.

(c) 2 Bro. C. C. 604.

(d) 6 Madd. 315.

(e) Vol. 2, p. 541 et seq.

(f) 5 Sim. 565.

(g) 1 Myl. & Cr. 52.

(h) 6 Ves. 148.

(i) 2 Vol. p. 346.

(k) 1 Vol., p. 93, 7th ed.

(l) 2 Beav. 188.

(m) See *Hope v. Hope*, 3 Beav. 321.

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Court should be settled, I think it right to observe, that the practice as stated in *Gilbert's Forum Romanum* (a), and as the registrars inform me, supported by numerous orders (b) accords with Lord *Langdale's* decision in *M'Kenna v. Everitt*.

On the other point, namely, the want of due notice of the time and place of the examination of the witness, it is admitted that the Defendants were served with the order on the 19th of March, and that this was due notice of the time and place of the examination of the witness on the 22nd of March (*Tomkins v. [*331.] Harrison* (c)), unless the circumstance, that the 20th of March was a Sunday, alters the case. The question, therefore, is, whether a Sunday intervening between the notice and the examination of the witness is to be reckoned in or excluded from the three-days' notice. It is certainly much to be desired that the practice of the Court should be uniform and settled upon such a subject as the computation of time, which enters more or less into its daily business. Yet this seems far from being the case. It appears that in some respects a different practice prevails between the Registrar's and the Six Clerks' Offices: *Mootham v. Waskett* (d), *Manners v. Bryan* (e). Again, if the last of a specified number of days allowed for doing an act, falls on a Sunday, the Sunday is not reckoned in the computation of time; but from the case of *Manners v. Bryan*, it seems doubtful whether this applies to a holiday. In *Bullock v. Edington* (f), Sir *Anthony Hart* decided that the eight days allowed for entering a demurrer with the registrar, meant eight

(a) P. 140.

(b) *Francis v. Hall*, Motn. 9 Dec. 1700, Reg. Lib. A. 1700, fol. 94. *Glover v. De Graves* Petn. 28 July, 1701; Reg. Lib. A. 1700, fol. 453. *Richardson v. Holder*, Petn., 18 Dec. 1700; Reg. Lib. B. 1700, fol. 108. Motion by Defendant to discharge the order alleging that the Plaintiff had not replied: order to stand, and Defendant to have liberty to examine &c.; S. C. 20 Dec., 1700, Id., fol. 130. *Withers v. Stenard*, Motn. 2 June 1701, Id., fol. 348. *Meriken v. Barker*, Petn., 17 Oct., 1701, Id., fol. 513. *Alderson v. Alcock*, Petn., 1 May, 1702; Reg. Lib. A. 1701, fol. 270. *Reynolds v. Morgan*, Petn., 3 Dec. 1701, Id., fol. 127. *Smith v. Foster*, Petn., 3 Dec. 1701, Id., fol. 212. *Moody v. Moody*, Petn., 31 March, 1702, Id. 271. Upwards of twenty similar orders appear to have been made on ex parte applications during the years 1702, 1703, 1704, and 1705.

(c) 6 Madd. 315. (d) 1 Mer. 243. (e) 1 Myl. & K. 458; 5 Sim 148, n.; S. C. (f) 1 Sim. 481.

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office days, excluding intervening holidays. But in *Manners v. Bryan* the Vice-Chancellor in deciding that where the last day is a holiday, that day is not to be reckoned, said, "If it had been one of the intermediate days it ought to have been counted." I have always understood that in the times allowed to a party for taking a step in a cause, Sundays in general are reckoned, unless the last day be a Sunday, in which case it is excluded. This is the practice as to the time allowed for filing demurrers. *Boys v. Morgan* (a), *Mylburn v. Lyster* (b), *Angell v. Wescombe* (c). For [*332] unless, in those cases the intervening Sunday were counted, the questions would not have arisen.

The practice of law is certainly no guide for the practice of the Courts of equity. But I find that although in some special cases, an intervening Sunday is not reckoned in the computation of time, as in *Howard v. Swith* (d), and *Cresswell v. Green* (e); yet in the rules applicable to pleading in ordinary cases, an intervening Sunday is reckoned. *Roberts v. Quickenden* (f), *Archbold's Practice* (g).

It may be true that a Sunday is not reckoned in the number of days required for a notice of motion, *Maxwell v. Phillips* (h), and at first I was inclined to think there was more analogy between that case and the case before me, than upon further consideration I think there is. Upon a notice of motion, the party served is bound to be prepared to meet the motion upon the very day upon which the notice expires, and, if not then prepared, his opportunity of defence may be gone altogether. But in this case, the object of the notice is only to give the party served an opportunity of cross-examining the witness after he has been examined in chief, and the power of cross-examining will not be lost, although expense may be occasioned by the cross-interrogatories not being ready in time. There is here no reason for departing from the ordinary mode of computing time. In the later cases it has been held, that an intermediate Sunday is to be reckoned: and I believe I am following the settled course of

(a) 9 Sim. 262.

(b) 5 Sim. 565.

(c) 1 Myl. & Cr. 48.

(d) 1 B. & Ald. 523.

(e) 14 East, 537.

(f) 11 East, 271, n.

(g) 1 Vol., pp. 91, 93, 7th ed.

(h) 6 Ves. 146.

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the Courts, in holding that in this case the Sunday ought to be reckoned.

The motion must be refused with costs.

*DODD v. LYDALL.

[*333]

LYDALL v. DODD.

1841. November 20, 22, and 23. 1842. January 29.—Equitable set-off.

A trustee of real estate became mortgagee of the trust estate, partly by taking an assignment of a prior mortgage, partly by taking an assignment of a mortgage created by his co-trustee and himself under their power for the purposes of the trust, and partly for money which he lent to the cestui que trust of the equity of redemption, subject to charges created by the will. The mortgagee and trustee filed his bill for foreclosure simply. The cestui que trust of the equity of redemption filed his bill for an account of the trust and of the mortgages, and that the mortgages might be ordered to stand as securities only for the balance due to the mortgagee and trustee upon the mortgage and trust accounts:—*Held*, that the Court might make one decree in both causes, so as to give the mortgagor any set-off he might be entitled to,—or make a decree of foreclosure in the former suit, and a separate decree for an account against the trustee personally in the latter, according to the circumstances and justice of the case.

JOHN LYDALL, the testator, by his will, dated the 24th of September, 1808, devised certain freehold premises, called *Uxmore* Farm, unto and to the use of *John Dodd* and *Thomas Dodd*, for a term of 500 years, without impeachment of waste, upon trust, by mortgage of the said premises, but not by an absolute sale thereof, to raise and pay the testator's debts, and certain annuities and legacies charged thereon, or so much thereof as, in the opinion of the said trustees or trustee, could not be conveniently raised and paid out of his residuary personal estate, which the testator empowered his wife to employ in carrying on his farming business until one of his sons should attain twenty-one. Subject to the term, the testator devised the premises to the use of his eldest son, *John Dodd Lydall*, in fee, and appointed his wife and *John Dodd* and *Thomas Dodd* his executrix and executors.

The testator died in October, 1808. At the time of his death,

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Uxmors Farm was subject to a mortgage in fee, made by the testator to *Robert Baker*, to secure the sum of 1,500*l*.

By indenture of the 17th of March, 1809, *John Dodd* and *Thomas Dodd* demised *Uxmors* Farm, for the term of 400 years, to a trustee for *Robert Baker*, to secure a further sum of 500*l*., which they borrowed of him. Both *John Dodd* and *Thomas* [*334] *Dodd* acted in the trusts of the will, which was proved by them and the testator's widow in April, 1809. The widow carried on the farming business for several years.

Robert Baker, the mortgagee, died, and his executors requiring payment of the money due upon the mortgage of *Uxmors* Farm, *John Dodd*, in September, 1813, out of his own monies, at the request of *Thomas Dodd*, his co-executor, paid to the executors of *Baker* the sums of 1,536*l*. and 512*l*., the amount of such mortgage money, with some interest then due. No transfer of the mortgage was made until, by indentures of the 18th and 19th of July, 1822, the heir-at-law and executors of *Baker*, in consideration of such payments in 1813, released and conveyed the premises to a trustee for *John Dodd* in fee, and assigned to him the residue of the term of 400 years.

John Dodd Lydall came of age in 1822. Being, as he alleged, in necessitous circumstances, in 1826 *John Dodd* advanced him 1,200*l*. on the security of *Uxmors* Farm; and, by indentures of the 12th and 13th of July, 1826, *John Dodd Lydall* released the premises by way of mortgage in fee to *John Dodd*, to secure the said 1,200*l*., and the 2,000*l*. previously charged thereon, with interest at 4*½* per cent. The rents and profits for several years up to July, 1826, had been received and applied by *John Dodd* and *Thomas Dodd*: *John Dodd Lydall* then entered into possession, and, as he alleged, executed the mortgage on the promise of *John* and *Thomas Dodd* to render him their accounts of the testator's estate.

John Dodd died in November, 1834, having devised *Uxmors* Farm to *William Dodd* and *Thomas Dodd*, the younger, [*335] the executors of his will. The first suit was instituted by *William Dodd* and *Thomas Dodd*, the younger, as such executors of *John Dodd*, against *John Dodd Lydall*, *Thomas*

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Dodd, the trustee of the term of 400 years, and the unpaid legatees of the testator, whose legacies were charged upon *Uxmore Farm*; and the bill prayed a decree for foreclosure. The second bill was filed in June, 1838, by *John Dodd Lydall* against *Thomas Dodd*, *William Dodd*, and *Thomas Dodd*, the younger, and other parties interested; and prayed an account of the personal estate and effects of the testator, and that *Thomas Dodd*, and the personal representatives of *John Dodd*, might be decreed to be answerable for what was due from *Thomas Dodd* and *John Dodd* respectively, and that the mortgage deeds might stand as a security only for what should appear to be due thereon, after deducting what was due from the estate of *John Dodd* upon taking such accounts, and that *Thomas Dodd* might be ordered to pay to the Plaintiff what, upon taking the account, should appear to be due from him.

On the application of the Plaintiff in the second suit, it was ordered that the two causes should come on for hearing together. The only question discussed at the hearing was, whether the two causes, under the circumstances, ought to be treated as relating to the same, or to distinct matters, and be the subject of one or two decrees; it being insisted on part of the Plaintiffs in the first suit, that they were entitled to a single decree for foreclosure in the ordinary form; and on behalf of the Plaintiff in the second suit, that the trust account should be taken under a decree in both suits, and that the foreclosure should be suspended until the balance on that account was ascertained.

**Mr. Cooper* and *Mr. Randell*, for *John Dodd Lydall*.

**Mr. Wakefield*, *Mr. Temple*, *Mr. Sharpe*, *Mr. Parry* [*336] and *Mr. G. L. Russell*, for the other parties.

VICE-CHANCELLOR:—

The Plaintiffs in the first suit (as executors of *John Dodd*) claim as mortgagees; and the scope of their bill is, to obtain a decree of foreclosure, without reference to the fact, that their testator, in his

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character of trustee, was an accounting party to *John Dodd Lydall*, the mortgagor, whom, with other persons having charges on the estate, he seeks to foreclose. The Plaintiff in the second suit is *J. D. Lydall*, the mortgagor; and the object of his suit is, to have the mortgage accounts and the trust accounts blended together, and that the mortgages may stand as securities only for what shall be found due upon the entire account. He seeks, in effect, that what he alleges to be due to him as cestui que trust, upon taking the trust accounts, may be set off against what he admits to be due from him as mortgagor, or due upon the security of the estate, the equity of redemption of which belongs to him.

There cannot be any doubt that I must give relief in the second cause to the extent at least of decreeing an account of the trust transactions; for no such settlement of the accounts of the trust is pleaded, as, in the circumstances of the case, could bind the Plaintiff in that suit; and if the result of that account were now ascertained, and it thereby appeared that the estate which the Plaintiffs in the first suit represent was debtor to the Plaintiff in the second suit, I see no reason why the Court should not give the Plaintiff in the second suit the benefit of the set-off which he claims: *Clark v. Cort* (a); and, further, as the two causes have been ordered to come on together, I do not doubt that, according to the practice of the Court, I may treat the two causes as one, if the justice of the case requires it: *Day v. Newman* (b). But the points which I have had to consider are, whether the practice of the Court obliges me to suspend the decree of foreclosure in the first cause until the trust accounts are taken; and, if the practice of the Court do not make this imperative upon me, whether the merits of the whole case do not require that I should make separate decrees in the two causes; or impose such terms upon the Plaintiff in the second cause as will prevent any possible inconvenience occurring to the Plaintiffs in the first cause by the decree of foreclosure being suspended.

Upon the mere point of form, I entertain no doubt. The order

(a) 1 Cr. & Phil. 184.

(b) 2 Cox, 77.

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that both causes come on together is made by the Court in ignorance of the merits of either of them, and only upon a representation that the justice of the whole case requires that they should be so heard. But if, upon hearing the two causes, the Court is of opinion that separate decrees should be made, the Court may take that course. Upon the law of the case, my opinion is equally clear. The mere existence of cross demands does not of necessity give a right of equitable set-off; and certainly the mere pendency of an account out of which a cross demand may arise, will not confer such a right. I had occasion, when at the bar, to give great attention to the question of equitable set-off in the case *of *Rawson v. Samuel (a)*; and the judgment of Lord *Cottenham* in that case, on appeal will be found fully to justify the opinion which I [*338] now express. It was there decided, that, in the case of cross demands arising out of the transactions not necessarily connected with each other, a court of equity is bound to look into all the circumstances of the case, and see whether an equity is made out for blending the two matters together at the expense of possible delay in concluding one of those matters.

The only question, therefore, is, whether, upon the whole case, I ought to suspend the decree of foreclosure until the trust account is taken for the purpose of blending the two accounts together, or whether I should at once make the decree of foreclosure, and leave the Plaintiff to his remedies against the estate of the deceased trustee. The two accounts have no original or necessary connexion with each other. The first mortgage debt of 1,500*l.* existed before the trust was created. The third mortgage debt of 1,200*l.* was created by the Plaintiff in the second suit in 1826. Upon the second mortgage debt of 500*l.*, I have felt some difficulty; for that was a transaction arising in the execution of the trust. But assuming the mortgage to have been authorized by the trust, which, apparently, it was, the charge upon the estate would be good, and the trustees would be personally accountable for the application of the money. Now I find, that, in 1826, upon the occasion of borrowing the 1,200*l.*,

(a) 1 Cr. & Phil. 161.

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this, as well as the other mortgage, was distinctly recognised and confirmed by the Plaintiff in the second suit. This fact he does not,

in his answer, deny : he says only that the mortgagee promised [*339] afterwards to satisfy him as to the trust accounts ; and in these circumstances, the mortgages had all been assigned to a stranger, I cannot, for a moment, doubt that the Plaintiff in the second suit might have been foreclosed and left to his remedies, in respect of the trust, against the trustees personally, or their estates. Nor is it unimportant to observe, that the mortgages are the property of one of several trustees ; whereas the trust account is the liability of all the trustees. I find, further, that the Plaintiff in the second suit has, in point of fact, acquiesced in all the trust transactions for more than fifteen years after he attained his majority,—for more than eleven years after his attention was particularly called to the state of the incumbrances upon his property,—during eight of which *John Dodd* was living,—and for more than three years since the death of the trustee, whose executors are Plaintiffs in the foreclosure suit. He, in fact, acquiesced until the mortgagee sought to realize his securities. It is impossible, in such circumstances, that I can exclude altogether the suspicion, that the second suit may have been instituted to gain time, and avert the immediate consequences of a decree in the first suit. I am satisfied I should be doing no injustice, if, in a case so circumstanced, I were to treat the mortgagee as a stranger to the trust, and at once make a decree of foreclosure in the first suit, and give the Plaintiff in the second suit a separate decree for an account of the trust. I shall not, however, go so far as that, unless at the option of the Plaintiff in the second suit. I shall do that which it is competent for me to do,—take a middle course. If the Plaintiff in the second suit will pay into Court the amount of the mortgages, and the interest due, I will make one decree in both causes, according to the tenor of the prayer of the bill in the second cause, and suspend the decree of foreclosure until both accounts are [*340] taken. If the Plaintiff in the second suit shall decline to pay the money into Court, I shall make a decree of

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foreclosure in the first suit, and a separate decree for an account of the trust in the second.

THE cause stood over to afford the Plaintiff time for consideration.

THESE causes coming on the 20th and 22nd days of November, 1841, and this day &c., and the Defendant, *John Dodd Lydall*, by his counsel, consenting thereto,— This Court doth order and decree, that the said *John Dodd Lydall* do, within one month after service of this decree (such service to be verified by affidavit), or without such service, provided such payment be made on or before the 25th of May next, pay the sum of 3,200*l.* into the Bank, with the privy &c., to the credit of these causes, being the amount of the principal monies secured by the indentures of the 12th and 13th days of July, 1826, in &c. [Order to invest &c.] And it is ordered, that the interest and dividends from time to time to accrue due on the said bank annuities, when so purchased, from time to time, when and as the same shall accrue due, be paid to the said *John Dodd Lydall*, he undertaking to keep down the interest on the said principal sum of 3,200*l.* [Declaration establishing the will of the testator, *John Lydall*. Accounts of his personal estate received by *John Dodd*, deceased, and Defendants, *Thomas Dodd* and *Mary Lydall*. Inquiry of personal estate outstanding. Receipts of Defendants, *Thomas Dodd* and *Mary Lydall*, to be answered by them personally, and those of *John Dodd* to be answered by the Defendants, *William Dodd*, the younger, and *Thomas Dodd*, the younger out of his assets in a course of administration, they admitting assets. Inquiry of real estate, rents and profits, and similar directions (except as to *Mary Lydall*) for answering the same]. And it is ordered, that the said Master do inquire and state to the Court what (if any) sum or sums of money has or have been raised by the said *John Dodd*, and the said Defendant, *Thomas Dodd*, or either of them, on the security of, or charged on, the estates of the said testator, or any or either of them, and how any such sum or sums (if any) has or have been applied. Account of debts &c. Legacies. Usual directions. Of sums applied in maintenance. Of advances to Plaintiff. At the request of the Defendant, *Thomas Dodd*, an account of monies expended on improvement of stock and implements of husbandry. Personal estate to be administered. Further directions and costs reserved. Liberty to apply.

 1841.—Walker v. Jeffreys.

[*341]

WALKER v. JEFFREYS.

1841: December 7, 8, 10. 1842: January 11, 24.

Lands were conveyed to a trustee, in trust to grant a lease of the mines under the same to certain persons for forty-two years, and, at the request of the lessees, made at any time thereafter, to grant a further lease of the same mines for twenty-one years, to commence at the expiration of the first term; the first lease to contain a covenant for renewal for the second term. The lease of forty-two years was made accordingly. Shortly before the expiration of the first term, the lessees applied for the renewal, which was refused. No proceedings were taken to enforce the performance of the covenant or trust for upwards of two years after the refusal. *Held*, that so far as the title to renewal depended on the covenant, the delay or acquiescence would be a defence in equity. [1]

Semble—That the lessees had an equitable interest in the trust, which would not be divested by the delay alone,—but that the lessees, in support of their title to a decree for performance of the trust, must shew that they had, by performing the covenants on their part, paid the price for which, on the instruments, the lessors had stipulated.

The performance of the covenants by the lessees being doubtful, and the lessees declining to try issues as to that fact, the bill was dismissed with costs.

JOHN READ, *William Bancks*, and *John Dumaesq*, were, in the year 1701, in partnership as coal and iron masters, and *John Read* was seised in fee of a messuage and buildings, and forty-seven acres of land, situate at Tibbington, in Staffordshire, subject to a mortgage in fee to *A. Cocker* for securing 2,000*l.* and interest; and he was also seised in fee of two other closes of land containing about six acres, called the Lower Ground. With the view of making a lease of these premises to the co-partnership, an arrangement was entered into between the parties, which was carried into effect by indentures of lease and release of the 5th and 6th of October, 1791: the release, between *A. Cocker*, of the first part, *John Read*,

[1] As to acquiescence presumed against a party by not asserting his rights in due time or on the proper occasion. *Nicholson v. Harper*, 4 M. & Cr. 179. *Pickering v. Pickering* 4 M. & C. 289, 304. *Greenhalgh v. Birmingham & Rail Way Co.*, 3 M. & C. 785, 95. *Williams v. The Earl of Jersey*, Cr. & Ph. 91. *Skinner v. Dayton*, 19 John, R. 561. *Watson's Executors v. M'Laren*, 19 Wend. 563. *Wyeth v. Stone*, 1 Story R. 282. *Bowser v. Colby*, 1 Hare, 139. See note 217 S. C. 112.

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of the second part, *J. Carpenter*, of the third part, and two trustees of terms of years in the lands, of the fourth and fifth parts, reciting, that *Bancks, Read, and Dumaresq*, had proposed, as co-partners, to accept a lease of the said premises "for the purpose of getting and raising the coal, iron-stone, and other minerals, in and under the same, and for making iron thereon, and to become co-partners, and to carry on such works and mines for their mutual benefit and advantage," according to articles of partnership, which "were intended to be executed; and that, for [*342] the better effecting the intention of the said parties, *Read* had applied to and prevailed upon *Cocker* to join him in conveying the fee-simple and inheritance of the said premises as thereafter mentioned, and the same were thereby conveyed to and to the use of *Carpenter*, his heirs and assigns, upon trust that *Carpenter* and his heirs should forthwith, with the consent of *Cocker*, his executors, &c., by an indenture of demise or lease, well and effectually remise, grant, lease, set, and to farm-let unto *Bancks, Read, and Dumaresq*, their executors, &c., all and singular the said premises for the term of forty-two years, subject to such provisoes, powers, covenants, conditions, &c., as should be requisite and necessary to enable *Bancks, Read, and Dumaresq*, to work and get the mines and minerals, and under such proper covenants on the part of *Bancks, Read, and Dumaresq*, their executors, &c., for the due payment of the surface and mineral rents thereby intended to be reserved and made payable as should be expressed in such lease; and upon further trust, that *Carpenter*, his heirs and assigns, should at any time thereafter, at the request, costs, and charges of *Bancks, Read, and Dumaresq*, their executors, administrators, or assigns, grant and execute a further lease of the said mines and premises for the further term of twenty-one years, to commence from the expiration of the said term of forty-two years, and to be subject to the same yearly surface rents, and to every other article, covenant, clause, matter, and thing, contained in the first-mentioned lease, except a covenant for renewal; and immediately after the date and execution of the said lease, upon trust to re-convey the premises to *Cocker* and his heirs, subject to the said lease, and to the proviso of redemption.

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[*343] The lease made in performance of this trust was *dated the 7th of October, 1791, and made between *Carpenter*, of the first part, *Cocker*, of the second part, the said two trustees of terms of years, of the third and fourth parts, and *Bancks*, *Read*, and *Dumaresq*, of the fifth part; and thereby, in consideration of the several yearly rents, provisoes, covenants, conditions, and agreements therein contained on the part of *Bancks*, *Read*, and *Dumaresq* their executors and administrators, to be paid, kept, observed, and performed, the whole of the said premises, together with the mines, and minerals under the same, with power to sink pits and shafts, and erect such engines and buildings, and do all other acts necessary for working the same mines, or any other mines adjoining to the premises, which might be thereafter worked or purchased by the said partners, their heirs, executors, &c., were demised by *Carpenter*, with the consent of *Cocker*, the mortgagee, unto *Bancks*, *Read* and *Dumaresq*, for the term of forty-two years from the 29th of September, 1791, at a surface rent of 100*l.* a-year, and certain royalties for the mines and minerals. The lease contained a proviso for re-entry in case of non-payment of the rents reserved, and a covenant that the lessees should and would so work the mines that there should be no more thereof wasted or left for the support of the roof than should be absolutely necessary for the safety of the works; and that all the mines should be fairly got and regularly worked out to as little disadvantage as possible to *Carpenter*, his heirs, executors, administrators, or assigns. There was also a covenant, on the part of *Carpenter*, expressed as in the *trust* (a), for the renewal of the lease for a further term of twenty-one years.

By indentures of the 7th and 8th of October, 1791, [*344] *made between *Carpenter*, *Cocker*, *Read*, and the said trustees of outstanding terms, after reciting the previous deeds and the lease,—the premises comprised in the mortgage to *Cocker* were reconveyed to him in fee, subject to a power in *Carpenter* and his heirs to grant the further lease of the mines and premises; and the other premises not in mortgage were reconveyed to *John Read* in fee. The interest of *Bancks* and *Dumaresq* in the

(a) *Supra*, p. 342.

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lease of the 7th of October, 1791, became, by subsequent assignments, vested in *John Read*.

By indentures, dated the 13th and 14th of April, 1796, *John Read* sold and conveyed the reversion in the mines to *Matthew* and *Thomas Jeffreys*. *Matthew Jeffreys* devised his moiety of the mines to his son *John*, who devised all his real estate to trustees for sale, and, after paying debts and an annuity to his wife, to divide the remainder amongst his children equally. *Thomas Jeffreys* devised his moiety to his daughter, *Mrs. Coxe*.

John Read became bankrupt in August, 1811; and his interest in the lease became vested in his assignees. The parties from time to time in possession under the lease, until the bankruptcy of *Read*, and his assignees, and afterwards, until 1815, worked the mines, and paid the royalties to *T. and M. Jeffreys*, or their devisees. In 1815, the mines were, as it was technically expressed, "drowned out;" and, after that time, they were not worked, nor was any royalty or rent afterwards paid in respect of the mines.

In 1817, *Samuel Walker* purchased of the assignees of *Read* their interest under the lease in the surface, and the same was assigned to him in 1822. On the 24th of June, 1833, the solicitor of *Samuel Walker* applied, by letter, to the solicitor of *John Jeffreys* and *Mrs. Coxe*, demanding a further lease [*345] of the mines for twenty-one years, to commence from Michaelmas, 1833, "according to the terms of the trust contained in the indenture of the 6th of October, 1791 (a), and also in pursuance of the covenant contained in the lease of the 7th of October, 1791 (b)." They also forwarded a draft of the proposed lease for perusal. On the 28th of June, the solicitor of *J. Jeffreys* and *Mrs. Coxe* returned the draft lease to *Mr. Walker's* solicitor, with a letter, stating that *Mr. Jeffreys* and *Mrs. Coxe* did not consider that *Mr. Walker* was entitled to demand the further lease. On the 1st of July, *Mr. Walker's* solicitors requested to be informed whether they might consider the letter of the 28th of June as a refusal to grant the lease; and on the 3rd of July, 1833, the solicitor of *Mr. Jeffries* and *Mrs. Coxe* distinctly replied in the affirmative.

(a) *Supra*, p. 342.

(b) *Id.*, p. 343.

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In August, 1834, *Samuel Walker* became bankrupt, and *Weldore Ellis*, who was his sole assignee, in December, 1834, agreed to sell his interest under the lease of 1791 to the Plaintiffs: this interest was assigned to the Plaintiffs by indenture indorsed on the agreement, and dated the 12th of January, 1836.

The bill was filed on the 27th of January, 1836, against the persons interested under the wills of *T.* and *M. Jeffreys*, and the representatives of *Carpenter*, praying a specific performance of the covenant in the lease of 1791 for a renewal of the lease of the mines, and that the Defendants might be decreed to execute a lease of the same premises to the Plaintiffs for the term of twenty-one years, to commence from the expiration of the said term of forty-two years.

By the answers of the Defendants, and the admissions [*346] entered into between the parties, the facts appeared, which are stated above.

Mr. Wakefield, Mr. Faber, and Mr. Craig, for the Plaintiffs (a).

Mr. Sharpe and Mr. Follett, for the Defendants, entitled to one moiety of the mines, and

(a) The arguments are fully considered in the judgment, and the following synopsis of them will, therefore, be sufficient in this place:—

<i>Plaintiffs.</i>	Covenant to re- new the lease.	Trust executed to grant the new lease.	
<i>Defendants.</i>	Breaches of cove- nant. (5 Sim. 65; 18 Ves. 63; 2 M. & K. 552; 1 T. & R. 18).	Acquiescence in refusal to grant the new lease. (2 Sim. & St. 29; 1 R. & Myl. 236).	Avowal at the bar of the in- tention not to work the mines.
<i>Plaintiffs.</i>	No breach of co- venant; or wai- ver of breach, if any.	Continued pos- session.	

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Mr. *Swanston* and Mr. *Bacon*, for the Defendants, entitled to the other moiety.

Mr. *Hardy*, for the representatives of *J. Carpenter*, the trustee.

VICE-CHANCELLOR :—

The Plaintiffs rest their title to relief upon two grounds,—upon the covenant for renewal contained in the lease of the 7th of October, 1791, and (if the court should refuse to enforce the performance of that covenant) upon the ground of a trust declared in favour of the lessees in the release of the 6th of October, 1791.

"I do not accede to the argument on behalf of the De- [*347]
fendants, that a decree may not be made upon the alleged trust, because the bill prays only the specific performance of the covenant. The question arises upon the construction of the instruments of October, 1791, which are common to both parties; and I should be greatly restricting the usual practice of the Court in such cases, if I were to refuse the Plaintiffs any equity under the prayer for general relief, to which they are entitled under the release of the 6th of October, 1791. There can be no surprise upon the Defendants by my not doing so; and that is a principal, though not always a conclusive test, by which the sufficiency of the prayer for general relief may be tried. I shall, therefore, entertain both the questions raised by the Plaintiffs.

To the relief sought, so far as it depends upon the covenant for renewal, it is objected—First, that the acquiescence from July, 1833, until the filing of the bill in January, 1836, in the refusal of the Defendants to grant the lease, is decisive against the Plaintiffs: *Heaphy v. Hill* (a); *Watson v. Reid* (b). Secondly, that those under whom the Plaintiffs claim have forfeited their right to the renewal by breaches of covenant in not having so worked the mines that nothing should be unnecessarily wasted or left (c); and, further, in

(a) 2 Sim. & Stu. 29.

(b) 1 R. & Myl. 226.

(c) *Supra*, p. 343.

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having wilfully discontinued working the mines in and since the year 1815, whereby they have become wholly unprofitable to the lessor.

To the objection on the ground of acquiescence, so far as the Plaintiffs' case depends upon the covenant, I should be strongly disposed to give every effect which the rules of the Court allow. [*348] In contracts relating to land, the time is not in general considered in equity as of the essence of the contract, and it was once considered that it could not be made so, even by express stipulation.[1] But after it had been decided that time might be made essential, the tendency of the decisions, especially those of Sir John Leach, has been to hold persons concerned in contracts relating to land, bound as in other contracts, to regard time as material. *Reynolds v. Nelson* (a); *Heaphy v. Hill* (b); *Watson v. Reid* (c); *Stewart v. Smith* (d); *Cooper v. Emery* (e); *Williams v. Edwards* (f); *Lloyd v. Collett* (g). And this principle has been applied with the greater strictness where the property was connected with trade, as in *Wright v. Howard* (h); and *Coslake v. Till* (i). These cases appear to me so sound in principle, that I certainly will not be the first to shake them. *Heaphy v. Hill*, and *Watson v. Reid*, are direct authorities, that if one of two parties, concerned in a contract respecting lands, gives the other notice that he does not hold himself bound to perform, and will not perform the contract between them, and the other contracting party, to whom the notice is so given, makes no prompt assertion of his right to enforce the contract, equity will consider him as acquiescing in the notice, and abandoning any equitable right he might have had to enforce the performance of the contract, and will leave the parties to

(a) 6 Mad. 18.

(b) 2 Sim. & Stu. 25.

(c) 1 Russ. & Myl. 236.

(d) V. C., 16th Dec., 1824. Not reported.

(e) Rolls, 17th July, 1829. Not reported.

(f) 2 Sim. 78.

(g) 4 Bro. C. C. 469.

(h) 1 Sim. & Stu. 190.

(i) 1 Russ. 376.

[1] Parties may by their agreement make time the essence of the contract. *Benedict v. Lynch*, 1 J. C. R. 370. *Hatch v. Cobb*, 4 John. C. R. 559. *Wells v. Smith*, 7 Paige, 22. S. C. 2 Edw. Ch. R. 78. *Morse v. Smedburgh*, 8 Paige, 601. *Carter v. Dean & Chapter*, 7 Sim. 211. *Colcock v. Butler*, 1 Desau. 307. *Hobson v. Bell*, 2 Beav. 17.

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their remedies and liabilities at law. In this case the Plaintiffs, or those under whom they claim, might have required a renewal of the lease at any time after the 7th of October, 1791. They work the mines from that time until 1815; from which time the working of the *mines has been discontinued. In July, [*349] 1833, the Plaintiffs have distinct and positive notice that the owners of the mines (who have no interest in the surface) deny the Plaintiffs' right to a renewed lease of the mines, in consequence of the breaches of covenant in respect thereof, and yet they made no assertion of right, nor declared any intention to assert it. I am not persuaded that either of the grounds put forward for taking this case out of the operation of the rule laid down in *Heaphy v. Hill*, and *Watson v. Reid*, is sufficient. The constructive possession of the mines, without ever actually entering them, which, since the termination of the term of 42 years, the Plaintiffs have had, by the occupation of the surface, has in no respect altered the position of either party; and the Plaintiffs knew that the determination of the Defendants not to renew the lease remained unrevoked. The payment in the meantime of the surface rent to the owners of the surface, ought not in my judgment to affect the rights of the owners of the mines. The ownership of the mines was severed from the ownership of the surface in the year 1796; and they have since been held as separate inheritances. This severance has always been acknowledged and acted upon by the lessees, and the persons entitled under them. The owners of the surface are not in fact parties to this suit. I have been desired by all parties to treat this as a case relating to the mines only; and, therefore, the frame of the bill disposes of this answer to the objection of acquiescence. It is not necessary, however, that I should express any more decisive opinion on this point, as the question in the cause does not depend upon the covenant alone; and I think the Plaintiffs are right in contending that under the trust existing in *Carpenter*, the lessees have an equitable interest, which the delay will not divest, provided it shall appear that the lessees have *paid the price for [*350] which the lessors had stipulated, and for payment of which the lessees were bound.

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I proceed to examine the second objection, which is founded upon the alleged breaches of covenant by the lessees of the mines. In reply to this objection the Plaintiffs have made four points :—First, that there is no evidence that more of the minerals were wasted or left for the support of the roof, than the safety of the works rendered necessary ; and that, according to the true construction of the covenant for working the mines, the lessees were not bound to work them, except at their own will and pleasure. Secondly, that the discontinuance of the working had not been wilful, for that the working was rendered impracticable by the drowning of the mines,—that this is a calamity to which all mining property is liable,—and in this instance would not have been prevented or counteracted by working the mines according to any construction of the covenants. In fact the Plaintiffs contend that a court of equity will not deprive them of the renewed lease by reason of accidents not under their control, and which, from the nature of mining property, must be considered within the contemplation of the parties at the time the original lease was granted. Thirdly, that acts or omissions, constituting only breaches of covenant, which would not have entitled the lessor to enter and avoid the lease, as in *Hill v. Barclay* (a), are not reasons for refusing to enforce the specific performance of the agreement to grant the lease. And, fourthly, that the lessor had never complained of the alleged breaches of covenant, and must, as against purchasers since 1815, be taken to have waived them.

[*351] The first point (so far as it relates to the *economical working of the mines, whilst they were worked), and the fourth point, must (if it is desired) be the subject of inquiry, although neither party will probably think the result of such inquiry of import equivalent to the expense likely to attend it. I cannot accede to the Plaintiffs' view of the other question involved in the first point,—that the true construction of the covenant is, that the lessees may work the mines or not at their discretion. The clearest language would be necessary to satisfy me that *Cocker*, the mort-

(a) 18 Ves. 56.

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gagee, whose trustee *Carpenter* was, intended to accept a surface rent just equal to the interest of his mortgage debt, and (no sleeping rent being reserved) to convert his interest in the mines, at the option of the lessee, into a dry reversion expectant upon two leases of sixty-three years' duration. I do not find any thing in the language of the covenant to force me to so improbable a construction. The covenant with *Carpenter* is, in equity, a covenant with *Cocker*,—and it is, “that all the mines shall be fairly got, and regularly worked out.” So far it is imperative; and I think that the subsequent words, which impose upon the lessees the obligation to work the mines “to as little disadvantage as possible to *Carpenter*, his heirs, executors, &c.,” do not so affect the construction of the previous words as to cancel the obligation which they would create. Such a construction of the covenant would not be reasonable. I think the covenant was intended to oblige the lessees regularly to work the mines, and something more. In *Mirehouse v. Scaife* (a), Lord *Cottenham* applied a similar principle of construction, and held, (overruling a decision of Sir *J. Leach*,) that a direction to pay debts, which would have charged real estate if there had not been a time limited within which they were to be paid, did not the less charge the real estate owing to that direction as to time. “It was a [*352] direction to pay debts, and more. I cannot understand how a man, who covenants to work mines, can be freed from the obligation to work them, because, in addition, he covenants that it shall be done in a workmanlike manner. The circumstance, that the lessees were also lessors of the mines, does not appear to me to throw any doubt upon the meaning of the covenant. It was the mortgagee for whose benefit the rent was primarily reserved.

The second point involves a question of fact, of which I have not sufficient knowledge to form any opinion. It is admitted, that the mines are in fact “drowned out;” but whether owing in any respect to the default of the lessees either before or after the “drowning,” the evidence is silent. I incline to the opinion, that, if the drowning of the mine be not attributable to any default on the part of the lessees, and if it is of the character which the Plaintiffs’ argument

(a) 2 Myl. & Cr. 695, 709.

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supposes, this Court ought to give the Plaintiffs their lease ; for, upon that supposition, they will be in no default, and the Defendants will have had, and still will have, all the benefit they ever could have in the mines under the operation of the covenant. This question must be put in a train of inquiry.

My ultimate decision upon the third point will depend in a great measure upon the result of the inquiries I have just referred to. The general rule in equity I take to be, that a party who asks the Court to enforce an agreement in his favour must aver and prove that he has performed, or been ready and willing to perform, the agreement on his part. Where, however, the strict application of that general rule would work injustice, the Court will relax it. A breach of an agreement may have been committed, for which a jury [*353] would only give *a nominal damage. A breach may have been committed, which a jury would consider as waived : and if the party committing those breaches has substantially performed other parts of the agreement, whereby, at his expense, the other contracting party has derived benefits under the agreement, a court of equity might fail in doing justice, if it refused to decree a specific performance : *Jones v. Jones (a)*. But if it has been by the default of the Plaintiffs that the beneficial interest of the Defendants in the mines has been wholly destroyed or suspended, and if, as their counsel has admitted at the bar, the Plaintiffs want the mines only to support and protect their buildings on the surface, and do not intend to work the mines, whether able or unable to work them, I am satisfied that I ought to refuse the decree which the Plaintiffs ask.

So far as the case of the Plaintiffs depends upon the covenant for renewal only, apart from the question of acquiescence, the case must result in the inquiries, which I shall presently mention.

But there is another part of the case which taken alone might relieve the Plaintiffs from the effect of mere delay in not sooner demanding a renewal of the lease. The Plaintiffs contend, that they have a title to the renewed lease, which rests upon grounds wholly independent of the covenant for renewal, and of any conduct with which they or those under whom they claim may be chargeable dur-

(a) 12 Ves. 188.

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ing the original lease. They contend that, by the terms of the release of the 6th of October, 1791, *Carpenter* was constituted a trustee for those under whom the Plaintiffs claim, upon two distinct trusts—First, upon trust to grant to the lessees a lease for forty-two years, with a covenant to be contained therein for a renewal of that lease for a further term of twenty-one [*354] years upon the request of the lessees; and, secondly, upon trust to grant that further lease of twenty-one years upon such request. The Plaintiffs further insist, that, inasmuch as the legal estate was absolutely vested in *Carpenter* by conveyance from the owners, he thereby became the trustee of the intended lessees, and that such lessees became absolute owners in equity of the mines for the terms and to the extent defined by *Carpenter's* trust; as in *Ellison v. Ellison* (a), *Pulvertoft v. Pulvertoft* (b), and *Ex parte Pye* and *Ex parte Dubost* (c). In answer to this, the Defendants insist, that, notwithstanding the conveyance to *Carpenter* upon the trusts mentioned in the release, yet, the intended lessees not having been parties, to the release, the Court must look into the whole transaction, and determine whether the intention was to constitute *Carpenter* a trustee for the intended lessees absolutely, or whether *Carpenter* was not a trustee for the lessors, as in *Walwyn v. Coutts* (d), and *Garrard v. Lord Lauderdale* (e); and they say that the lessees not having been parties to the release could not have sustained a bill against *Carpenter* to enforce the supposed trust.

It appears to me, that both parties have carried their arguments upon this part of the case further than the case will bear. I cannot hold that *Carpenter* was exclusively the trustee of the grantors in the release of the 6th of October, 1791, and not to any extent the trustees of the intended lessees. The deed itself negatives such a conclusion,—as do the acts of the parties under the deed.

(a) 6 Ves. 656.

(b) 18 Ves. 84.

(c) 18 Ves. 140.

(d) 3 Meriv. 707; S. C. 3 Sim. 14.

(e) 3 Sim. 1; S. C. 2 Russ. & Myl. 461.

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[*355] [*His Honor stated the recitals in that deed, and the subsequent facts (a).]

If the lessees have in fact done all which on their part ought to have been done, I think this Court would have given them the second lease upon their own application, and charged *Carpenter* with a breach of trust, if, by any act of his, the original lessees had been deprived of such lease. But I cannot hold that the trust declared in favour of the lessees is so imperative, that this Court must now treat it as executed, and decree *Carpenter* to grant the second lease irrespective of the conduct of the lessees during their antecedent term. Suppose a contract for the sale of land,—the purchase-money to be paid on a given day,—and the legal estate to have been conveyed by the vendor to a trustee, upon trust to convey to the purchaser on a day later than that upon which the purchase-money was to be paid,—in such a case a court of equity would not decree the conveyance to be executed until the purchase-money was paid. How does that differ in principle from the case now before me? Here the second lease was to be executed upon request, and might have been called for before the lessees would have been required to perform a single duty under the prior lease; this is an apparent distinction; but, in principle, there is no difference between the two cases. In each the contract is mutual, and the conveyance or lease is to be executed in consideration of a duty to be done by the party claiming it; and if that party has wilfully failed in his duty, and put it out of his power to perform his obligations to the lessor, and those facts appear at the time when this Court is called upon to act, there is a failure of consideration, and the Court ought to leave the parties to their legal rights.

[*356] *I think, therefore, that, with the exception of the point of acquiescence, the rights of the Plaintiffs under the trusts, and under the covenant, are co-extensive, and that the two questions must result in the same inquiries.

HIS Honor pronounced the decree substantially as follows, giving liberty to speak to the cause upon minutes:—The Plaintiff waiving in this suit, so much of the

(a) *Supra*, p. 341, *et seq.*

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relief prayed by the bill as asks a decree in respect of the surface &c., and waiving absolutely all relief in respect of pipe, pot, and fire clay, direct two issues—First, whether the mines became drowned out by reason of any default in the lessees in not fairly getting and regularly working the same mines, according to the covenant. Secondly, whether the mines have since continued in such state by reason of any such default. Declare that this decree is to be without prejudice to parties beneficially interested in the mines under the will of *John Jeffreys*; and, by consent of the Plaintiffs, direct that, if any lease shall be granted, the same shall contain a recital of so much of the said will as &c. (a).

All parties beneficially interested in the questions declining to try the issues. The Plaintiffs asked for the judgment of the Court.

VICE-CHANCELLOR :—

The issues which it was my intention to have directed, would, I think, have been the only satisfactory mode of deciding this cause. The parties might thereupon have obtained the opinion of a court of law upon the disputed construction of the covenant; and as the question of fairly and regularly working mines is a question of local custom, I should, by means of the issues, [*357] have had the best information upon that subject which the nature of the case admits of. The ground upon which alone I thought I could refuse to declare that the heir of *Carpenter* was bound to grant the lease, was that of its appearing (if it should so appear) that the lessees, by wilful breaches of covenant, had not paid, and had in substance put it out of their power to pay, the price which was the consideration for the trust of which they claimed the benefit, and were, therefore, in the situation of purchasers asking this Court to decree a conveyance in their favour, they not paying or being able to pay the consideration for it. With the knowledge that such was my view of the case, the Plaintiffs require me to determine upon evidence, which, as I have said, is unsatisfactory and insufficient, whether the lessees have

(a) Vide *supra*, p. 296.

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made wilful default in the performance of the covenants in the original lease. The only way in which I can do this is, by determining upon whom I ought to consider the onus as resting to give me the required information, and by considering that party as not having established his case. Now, I think I must consider that onus as resting upon the Plaintiffs. Up to 1815, the lessees worked the mines, and paid the royalties. In 1815, they ceased doing so; and, according to my construction of the covenant to work the mines, they are chargeable with a breach of covenant, unless it can be shewn that it is not by their default that the mines either became drowned out or have since continued so. What reason do they give for suddenly ceasing those mining operations which they have covenanted to carry on? The only explanation is a suggestion in the bill, that the mines are in fact "drowned out;" and, by refusing to try the issues I have offered, they decline, in effect, to give me any information either as to the meaning or the cause of the drowning out. The only inference I can draw from the [*358] fact, that the mines are "drowned out," is, that, before the mines can be further worked, means must be taken to relieve them from water; but I cannot in favour of the Plaintiffs, upon whom the onus of proof lies,—they having now and having always had exclusive possession of the mines, and of the means of giving me the information I require, yet declining to try the issues,—intend that, by properly working the mines, they might not, since 1815 and still, have produced rent to the lessors. I regret the course which has been taken by the Plaintiffs; but I think I cannot upon the case before me do otherwise than dismiss the bill with costs.

THE Plaintiffs and Defendants by their counsel declaring to try the following issues,—whether &c. (see p. 356), dismiss the Plaintiffs' bill with costs &c.

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THOMPSON v. DERHAM.

THOMPSON v. GOODMAN.

1841: December 21. 1842: January 4, 13.

Plaintiffs in equity claiming to be admitted as creditors under a fiat in bankruptcy in respect of a breach of trust by the bankrupts, which was the subject of the suit in equity, applied, on a dividend of the bankrupt's estate being about to be declared, to be allowed to enter a claim upon the proceedings, and to have a fund reserved: the application being refused by the commissioners, was renewed by petition to the Court of Review, and also refused by that Court. A supplemental bill was then filed, praying an injunction to restrain the assignees from paying any dividend which might be declared, until the cause in equity was heard, or without reserving a sufficient fund to answer the Plaintiffs' demand.

Held,—That if the Court of Chancery had jurisdiction to interfere in the distribution of the estate of a bankrupt, the Court ought, upon general principles, after an adjudication in bankruptcy on the subject of the distribution, to refrain from exercising such jurisdiction.

But, *semble*,—The Court has no jurisdiction to interfere in the mere distribution of the estate of a bankrupt, either on the ground of trust or otherwise.

WILLIAM HINDE, *Walter Alan Hinde, James Derham, and Robert Derham*, became co-partners as worsted-spinners and wool-staplers, and executed articles of partnership, dated the 1st of June, 1829, to the following effect:—The partnership to continue until the 14th of June, 1845. The freehold and leasehold mills, warehouses, tenements, machinery, and effects *mentioned in [*359] the articles to be transferred to the partners, and (subject to the provisions therein) to be considered as divided into twenty parts or shares, of which eleven-twentieths to be the property of *William Hinde*, and the remaining nine-twentieths, the property of the other partners, in equal shares; *William Hinde*, in addition to the sums to be advanced by the other partners, to bring into the partnership such further monies as the partnership trade might require, and the three partners (other than *William Hinde*) to bring in such sum or sums of money as they might find it convenient to do. If capital were brought in by any of the partners (other than *William Hinde*), exceeding the capital necessary to carry on the trade, *William Hinde* to be at liberty to withdraw his capital in proportion to the money

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so brought in by the others; and, in the mean time, 61,846*l.* 10*s.*, the amount or value of the property so agreed to be transferred to the partners, to be considered as the capital of *William Hinde*. The profits of the partnership, subject to payment of interest, and certain annual allowances to the co-partners, to be divided between them in the proportions in which they were to be considered interested in the said partnership property. Books to be kept shewing the transactions of the concern. A full account and valuation in writing to be made out between the 20th of May and the 1st of June in each year, or as soon as conveniently might be, of the stock in trade, and of all the real and personal estate, monies, and effects of the partnership, in order that it might appear from time to time what the yearly profits or loss of any one year of the said joint trade should amount to, and the said partners might be the better enabled to estimate and ascertain the amount of their respective shares and interests in the said concern: this account to be signed by and, to be conclusive between the partners, except as to the [*360] debts and credits of the concern, in respect of which the account was to be corrected as circumstances and casualties might require: the account not to be afterwards called in question, unless on discovery in the lifetime of the parties who settled it of some manifest error to the amount of 100*l.* or upwards. Clause 25. In case of the death of any partner within the partnership term, the surviving partners, during the remainder of the term, to pay to the widow or children of the deceased, or as he should direct, certain annual sums, being 400*l.* per annum on the death of *William Hinde*, and 200*l.* on the death of any of the other partners. 26. In case of the death of *William Hinde* before the expiration of the said partnership term, leaving a son or sons him surviving, he (*William Hinde*) to be at liberty, by any writing under his hand and seal, to take effect upon his decease, or by his last will and testament in writing, to nominate and appoint any one or more of his sons to succeed him to five of the said twentieth parts or shares of the said joint trade, and the capital and future gains and profits thereof, and such son or sons so to be named appointed thereupon to do and execute all requisite or proper acts and deeds for the purpose of sub-

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stituting and confirming him or them respectively in the place or stead of *William Hinde*; but such son or sons, or the representatives of the said *William Hinde*, not to be at liberty to interfere in the management, conducting, or carrying on of the affairs of the partnership, and the said other partners to be at liberty to make such alterations in the style or firm of the said partnership as might, under the circumstances, be thought advisable or necessary. 27. If *William Hinde* should die, and nominate any son or sons to succeed him in the partnership, he (*William Hinde*), his executors or administrators, or such son or sons as might so become a partner or partners, to continue in or advance and bring into the partnership such sum or sums *of money as and for his [*361] and their capital as the other partners might require for that purpose, not exceeding in the whole 30,000*l.*, and subject to the said annual allowances to each of the other partners or any of their widows, and the payment of interest on the capital of all parties engaged in the joint trade, the gains, profits, and proceeds of the partnership, and the effects thereof, to be divided into four equal parts or shares, one of which parts or shares to go and belong to such son or sons of *William Hinde*, and the others of such fourth parts or shares to go and belong to the said *Walter Alan Hinde*, *James Derham*, and *Robert Derham*, or their respective representatives, as thereafter mentioned. 28. If *William Hinde* should die before the expiration of the partnership term, the surviving partners (if two or more were then living) to take and purchase such share and interest of *William Hinde* of and in the freehold and leasehold estates, machinery, stock in trade, debts, and effects of the partnership as were not so disposed of to any of his children, at such sum or sums of money as the same were or appeared to have been valued at the time of such last annual stock-taking or valuation; and such surviving partners, within one month next after such decease, or as soon after as circumstances would permit, to execute to the executors or administrators of *William Hinde* a sufficient mortgage or mortgages of the said freehold and leasehold estates, (subject to any existing incumbrances), and also the joint and several bond of the said surviving or continuing partners, for securing to

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the executors or administrators of *William Hinde* his amount and share of and in the said partnership estate, stock and effects (except bad or doubtful debts), together with interest from the time of such last stock-taking, at the rate of 5*l.* per centum per annum, in addition to the annual sum payable to his widow, as [*362] follows, viz. the sum of 1,500*l.* at the end of each succeeding year, with like interest half-yearly on the amount of the said principal, or so much thereof as should be unpaid, but no such yearly payment of the said capital of the said *William Hinde* to be made or become payable to his executors or administrators until the year 1835, and so on annually after that time: if two of the partners were not living at the decease of *William Hinde*, then the partnership to be dissolved as if by effluxion of time, and such distribution, division, and disposal of the partnership estate and effects to take place as was thereafter provided for on the expiration of the said term.

The business was carried on under these articles until they were varied by an agreement of the 7th of February, 1832, in the form of a memorandum, whereby *William Hinde* was to have five,—*Robert Derham* six,—*James Derham* five,—and *Walter Alan Hinde* four-twentieths of the concern: the annual stock-taking was to be on the 30th of June; and no part of the capital of *William Hinde* was to be paid out until six years after his death.

At the annual stock-taking in June, 1833, the amount of *William Hinde's* share in the property of the concern appeared to be upwards of 41,000*l.*

In January, 1834, *William Hinde* died, having by his will and codicils appointed *Ann*, his wife, *James Derham*, *Robert Derham*, and *W. Lamb*, executors; and thereby, among other things, after reciting the substance of the 25th and 26th clauses of the articles(a), directed as follows:—“Now it is my particular wish and desire that

[363] the said trade and business may be conducted and carried on by my surviving partners in such manner as will be most conducive to the interests of themselves and fami-

(a) *Supra*, p. 260.

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lies as well as to the interest and advantage of my own family; and I do direct and appoint by this my will, that the share and interest so reserved for my said sons may be divided or appropriated to and for the use of the whole or any two or more of them my said sons, in such shares and proportions, and at such time or times, and in such manner, and subject to such alterations and restrictions from time to time during the remainder of the said term, as my said wife during her life, and, after her decease, as the said *William Lamb* and *James Derham*, and the survivor of them, may think expedient and proper, and as circumstances and the conduct of my said sons or any of them, shall warrant and guide her or them in such division or appropriation of the said trade and business; but my present intention is, that if my said son *Thomas Foster Hinde* should live and conduct himself properly in business, he should have the whole of the said five-twentieth shares in the said trade and business on his attaining twenty-one years of age, he being charged with interest for the capital employed in the said trade and business belonging to my estate at the usual rate, provided that no more of the profits shall be paid or applied to or for the use of my said sons, or any of them during their minorities, than shall be necessary for their maintenance and education, but that the residue thereof (if any) shall accumulate and form part of the residue of my estate and effects; and, on the expiration of the said co partnership, or upon any renewal or alteration thereof, it is my desire that some one or more of my said sons, if then living, may be admitted to a share or shares of the said business upon fair and equitable terms.

No other case was cited; and, except the case of *Bromley v. Goodere*, not one of the cases cited can be considered as establishing the jurisdiction now contended for, and that case cannot be considered as affirming the propriety of exercising such a jurisdiction in a case like the present.

Anne Hinde, the widow, and *James Derham*, proved the will and codicils. *Robert Derham*, it appeared, did [*364] not prove, and *Lamb* renounced.

The partnership business was carried on by the surviving partners. No mortgage or bond was given by them for securing the

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41,000*l.* due to the estate of *William Hinde*, or any part of it. An account was opened as between that estate and the partnership; and it was alleged by the Defendant, representing the partnership in this suit, that payments were made by the concern on account of *William Hinde's* estate sufficient to discharge the claim of the latter. No steps were taken to withdraw his capital from the concern, or otherwise wind up the partnership as upon a dissolution. *Anne Hinde*, the widow, died in July, 1835.

On the 24th of December, 1839, a fiat in bankruptcy issued against *Walter Alan Hinde*, and *James* and *Robert Derham*. The Defendants, *Goodman*, *Hubbard*, and *Marten*, were chosen assignees of their estate and effects. *Robert Derham* died on the 2nd of March, 1840, uncertificated.

The original bill was filed in May, 1840, by the children of *William Hinde*, and the trustees of a settlement made on the marriage of his daughter, who were beneficially interested in his estate. The Defendants were *James Derham*, *Goodman*, and the other assignees, *Fearenside*, the registered public officer of the Lancaster Banking Company, who claimed a lien by equitable mortgage of certain property of the partnership (a), the "heir-at-law of *William Hinde*, who was also devisee for life of his real estate, and his son, the first tenant in tail, and the husband and child of the daughter entitled under the settlement. The bill charged, that the carrying on of the trade, after the death of *William Hinde*, was a breach of trust; that his estate was to be considered as a mortgage of the partnership property under the 28th article (b); that the bankrupts ought to be considered in equity as

(a) In June, 1840, *J. Fearenside* filed his bill against the assignees of the bankrupts and the partners interested in the estates, and of *William Hinde*, including the Plaintiffs in the above suit, (*Thompson v. Derham*), to establish the lien of the Banking Company; and by an order of the *Master of the Rolls*, in *Fearenside v. Derham*, the assignees were ordered to bring into Court the produce of certain property mentioned in the order, upon which the Banking Company claimed a lien. The *Vice-Chancellor*, on delivering his judgment on the motion in the above case of *Thompson v. Derham*, observed, that the order in *Fearenside v. Derham* provided for so much of the original suit of *Thompson v. Derham* as sought to establish a lien upon any specific property of the partnership, although that did not affect his judgment in the latter case.

(b) *Supra*, p. 361

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having given the bond which by that clause they agreed to give ; and that the bankrupts were indebted to the estate of *William Hinde* at the time of the bankruptcy in respect of other breaches of trust. The bill prayed, that the trusts of the will of *William Hinde* might be carried into execution, and that the Plaintiffs might have the benefit of a lien upon the partnership property for what should be found due to the estate of *William Hinde* from the partnership, and that the same might be paid by means of a sale of the partnership property ; that the estate of *William Hinde* might be declared a creditor for the deficiency (if any) after such payment against the joint and separate estates of the bankrupts ; and that a receiver might be appointed to prove against the bankrupt's estate for the debt due to *William Hinde's* estate ; and that the assignees might be ordered to set apart and reserve out of the assets a sufficient sum to answer such debts, or that the Plaintiffs might be authorized to enter a claim for the amount.

"The assignees of the bankrupts, by their answer, alleged [*366] that the affairs of the partnership were in an embarrassed or at least doubtful state at the death of *William Hinde*, and that the property of the partnership was then insufficient to answer the amount at which it was valued ; and that *Ann Hinde*, his widow, and such of his children as were of age, in accordance with the articles of partnership, and the will and intentions of the testator, agreed to carry on the partnership business ; that the accounts were annually made up and signed by *James Derham* in his character of executor ; that by the said will, and such the lawful acts of the executors, *William Hinde*, as to his entire estate, continued a partner in the concern, and could not, therefore, prove under the fiat in competition with the creditors of the partnership ; that the other partners had no means of carrying on the same without the property, which belonged to *William Hinde*. The assignees also stated, that, at different times, the sum of 20,579*l.* had been paid out of the concern to the estate of *William Hinde* ; that the account made at the last stock-taking, which preceded his death, did not truly represent the state of his account with the concern ; and

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that, upon a true statement thereof, and of the said subsequent payments on account thereof, the estate of *William Hinde* would appear to be fully satisfied. On behalf of the assignees, it was submitted that the agreement of February, 1832, having reduced the share of *William Hinde* to five-twentieths, left nothing within the operation of the 28th article, and relieved the case of all question with respect to the bond and mortgage.

The commissioners, acting under the fiat, were about to declare a dividend of the estate of the bankrupts; and the Plaintiffs applied to enter a claim upon the proceedings, and to have [*367] a fund reserved for the purpose of answering it, which the commissioners refused: the Plaintiffs thereupon presented a petition to the Court of Review, praying that the commissioners might be directed to allow a claim to be entered on behalf of the estate of *William Hinde*, as well against the joint estate as against the separate estates of the bankrupts for the amounts therein mentioned, and to reserve a dividend sufficient to answer the amount of such claims, in case the same should be afterwards proved as debts, or that the commissioners might be ordered to stay any declaration of dividend until the hearing of this cause.

The petition was heard before Mr. Justice *Rose*, who made no order, but expressed his opinion that the assignees ought not to pay any dividends that might be declared upon the estate of the bankrupts until after the petitioners should have had an opportunity of applying as they might be advised to this Court, in the cause of *Thompson v. Derham*, to protect their interests against the threatened proceedings with regard to the dividend (a).

The Plaintiffs then filed their supplemental bill against the assignees, stating the proceedings with regard to the intended divi-

(a) On the argument of the motion for the injunction, an affidavit was read, stating that the learned Judge in bankruptcy pronounced the opinion stated above.

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dead, and praying an injunction to restrain the assignees from paying any dividends which might be declared upon the debts which had been or should thereafter be proved against the joint estate and separate estates respectively of the bankrupts, or from parting with such estates respectively, or any part thereof, until the hearing of the cause of *Thompson v. Derham*, or until further order of this Court, or that the Defendants might be restrained from paying such dividends and from parting with such estates, or any part thereof respectively, without reserving a sufficient part of the said estates to answer the said sum of 41,000*l.* and interest thereon, and also in respect of the sum due to the estate of *William Hinde* in respect of the breaches of trust therein mentioned, equal in amount to the dividends paid to the other creditors of the bankrupts. [*368]

The motion for the injunction was made in the terms of this prayer.

Mr. *Sharpe*, Mr. *James Russell*, and Mr. *Bacon*, for the motion.

Mr. *Bethell*, Mr. *Barlow*, and Mr. *Mylne*, contra (a).

THE VICE-CHANCELLOR,—after observing that he was not informed of the grounds upon which the learned Judge in bankruptcy had gone; but he concluded, that his opinion was, that the Plaintiffs might have a claim, and that the same might ultimately be admitted to proof, if established in this Court,—

I have, therefore, thought it right carefully to consider this part of the subject, in order that the case of the Plaintiffs may not sustain prejudice elsewhere from any doubt as to the grounds upon which my judgment proceeds. My opinion is, that, according to the true construction of *William Hinde's* will, [*369] his executors were not authorized to embark his whole estate in the trade. Under the articles, and the memorandum of

(a) The motion was made in vacation, and was not argued in Court: the arguments cannot, therefore, be stated: they appear, however, from the judgment.

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February, 1832, *William Hinde* had an interest in the partnership amply sufficient to satisfy the words of the will, without supposing he intended to subject his property to the risks of trade to any extent beyond what the articles and memorandum obliged him to do. I think the executors in so doing committed a breach of trust (a); and, as the partners were cognisant of this breach of trust, I think the retainer of the testator's assets was unlawful, and that such unlawful retainer created a joint debt from the surviving partners to the estate of *William Hinde*. The amount of this debt is a question of account; and unless the practice in bankruptcy differs from that of this Court in analogous circumstances, the case would seem to be one for admitting a claim to be entered upon the proceedings.

Entertaining this opinion upon the construction of *William Hinde's* will, it is not at present necessary that I should enter more fully into the argument urged on behalf of the Defendants upon the 28th clause, as affected by the agreement of February, 1832: if that argument were well founded, it would affect only the security of the Plaintiffs for their claim, and not its nature or amount. But I have great difficulty in understanding how the 28th clause of the articles, and particularly that part of it which relates to withdrawing *William Hinde's* capital after his death, can be read without coming to the conclusion that the bond and mortgage were to cover all his interest in the partnership, ultra what might constitute the capital of any of his sons, who, under the 25th clause, should become a partner in the concern. The evidence before me may lead me to doubt whether the Plaintiffs will eventually sustain their demand to the extent they carry it; but they have now the settled account of June, 1833, upon which to launch their claim; and in this stage of the cause, upon the vague evidence before me, I cannot consider that part of their case as displaced, nor give any effect to the suggestion, that by possibility some debts of the partnership due in the lifetime of *William Hinde* may yet remain unpaid. The only claim of such a character is that of the Lancaster Banking Company; and the case of the assignees in re-

(a) See *Willott v. Blanford*, *supra*, pp. 257, 265.

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spect of that claim is, that it is unfounded (a). All the proceedings in the bankruptcy treat the bankrupt's estate as applicable to the payment of the creditors of the bankrupts.

The delay of the Plaintiffs, in bringing forward their case, has not been explained to my satisfaction, perhaps for want of an inspection of the proceedings under the fiat, to the contents or supposed contents of which I was referred during the argument in explanation of this part of the case. I shall, however, pass by that consideration, and consider the question before me, upon the assumption, that the Plaintiffs have a case for proof or claim.

Assuming, then, that there is, on the part of the Plaintiffs, a case for proof, or at least for claim, have I, sitting in equity, jurisdiction to restrain the assignees from paying a dividend which the commissioners may order to be paid? And if I have such jurisdiction, ought I to exercise it?

There is, in this case, no charge of misconduct against any one by which the trial of the Plaintiffs' right before [371] the Court of Review has been prevented or prejudiced.

There has been no want of opportunity on the part of the Plaintiffs to have their case tried in the Court of Review. The case has in fact been tried in that Court, and a decision pronounced against the Plaintiffs. They have not availed themselves of the right of appeal (a very imperfect one I admit) to which the legislature has thought it proper that appellants in bankruptcy should be confined; and I must, therefore, deal with the case as if an appeal had been resorted to, and the decision of the Court of Review had been confirmed, upon appeal. What is there in such circumstances which can make it unconscientious in a creditor to claim the benefit of an order of dividend?—unless it be unconscientious in a suitor to avail himself of a judicial determination in his favour by a Court of competent jurisdiction, only because a Court of concurrent jurisdiction may possibly think that justice has not been done.

The equity of this bill (as stated at the bar) resolved itself in two points:—First, that the claim which is made by the bill, is peculiarly

(a) *Fearenside v. Derham*, *supra*, p. 364, n.

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one of equitable cognisance,—that the jurisdiction of this Court to investigate and adjudicate upon the Plaintiffs' case is not ousted by the existence of a concurrent jurisdiction in the Court of Review,—and that the exercise by this Court of such its undoubted jurisdiction will, in this case, be rendered nugatory, unless the Court will, *pendente lite*, protect the property, out of which alone the Plaintiffs' demand can be satisfied.

Upon this part of the argument on behalf of the Plaintiffs, I inquired whether the jurisdiction, which it was insisted that this Court had, to grant the present motion, was a jurisdiction confined to cases in which the "Plaintiffs' debt was to be established in equity, or whether, if it existed in such cases, it must not extend also to restrain the division of a bankrupt's property pending litigation in any other Court, where that division would produce the results apprehended in this case. The answer which I received was the only answer which could be given to the question. It was admitted, that the jurisdiction must so extend, if it exists at all; and it was argued, that it did extend to all cases in which the necessity for protecting property pending litigation should arise.

The question, therefore, resolves itself into this:—Whether, if a dividend were declared, and the claim of a particular creditor to share in that dividend had been rejected by the Court of Review, this Court, at the suit of the disappointed creditor, has jurisdiction to prevent, or ought to prevent, the other creditors from receiving such dividend until, by a trial either in equity or at law of the same question upon which the Court of Review had adjudicated, this Court shall be satisfied that the decision of the Court of Review was correct?

The second argument for the Plaintiffs was, that a court of equity has a general jurisdiction over all trusts,—that assignees in bankruptcy are merely trustees,—that at a time when the jurisdiction of the great seal in bankruptcy was not so fairly established, or so well defined as it afterwards became, the *Lord Chancellor* habitually relieved himself of all difficulties arising out of a doubtful jurisdiction, by directing or requiring parties claiming in bankruptcy to establish their claim by proceedings in equity,—that there are no words in

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the bankrupt acts to exclude the jurisdiction of the Court of Chancery in cases of trust,—that, in the absence of such words of exclusion, its original and inherent jurisdiction “must [*373] remain,—and that the exclusive exercise by the commissioners in bankruptcy of the jurisdiction to distribute the estates of bankrupts, was to be referred to convenience, and not to the want of jurisdiction in the Court of Chancery. And I was referred to cases in which it was said this Court had, in bankruptcy, done that which, in principle, could not be distinguished from what I am now required to do.

With some of those cases there is no difficulty in dealing. The bankrupt acts may be represented as enabling the commissioners to distribute the bankrupt’s estate. But what shall be deemed the bankrupt’s estate is matter for preliminary inquiry: that is left for adjudication between the assignees in the bankruptcy and those against whom they may assert a claim. And, undoubtedly, the law in many cases leaves questions of that nature, when they arise between the assignees and strangers to the fiat, to be decided by the courts of ordinary jurisdiction. Again, the law in bankruptcy decides that the joint and separate estates of bankrupts shall be distributed, in a known manner, amongst the joint and separate creditors. In this case, what is joint and what separate estate are matters of preliminary inquiry. And to decide satisfactorily upon such questions, the aid of courts of other jurisdiction than those in bankruptcy may often be required. In many cases, as in *Devaynes v. Noble* (a), and in the case now before me, it may be practically impossible to arrive at a safe conclusion upon the question of debt or no debt upon a petition in bankruptcy, or by any means, except a bill in equity.

But the question now before me is not, whether “spe- [*374] cific property is part of the bankrupts’ estate or not; nor whether the assignees are about to give one class of creditors specific property which, by law, belongs to another class; nor whether the Plaintiffs in this suit are not entitled to proceed in equity

(a) 2 Russ. & Myl. 495.

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to prove that they are in fact creditors upon the bankrupts' estate. The property about to be distributed is the property of the bankrupts. The creditors, amongst whom it is about to be divided, are of the class of creditors to whom, by law, it belongs. The question, whether the Plaintiffs are creditors, may be tried by bill, because of the nature of the case out of which the claim arises; but the question is, whether I am to stay the dividends until that question shall have been tried here, which has been tried already by a court of competent jurisdiction.

The only authority, apparently in point, is a case mentioned in Lord *Henley's* treatise (a). There the petitioners claimed lien upon two estates, the produce of which the assignees were about to divide under the commission. The petition prayed, that the assignees might be restrained from making any dividend of the estate and effects of the bankrupts; and the order, which was to be without prejudice, allowed the dividend, which was then proposed, to be made, and restrained the making of any further dividend of the produce of those two estates, without the leave of the [*375] Court (b). That case is "clearly no authority for what I am asked to do in this case.

(a) Eden on Injunctions, p. 298. "An injunction may be granted on the application of a plaintiff in a bill for an account against a bankrupt to restrain the assignees from making a dividend till the account has been taken." *Atkinson v. Plummer*, 5th August, 1811.

(b) "It is ordered, that the said defendants (the assignees) be at liberty to make the present dividend of 1s. in the pound under the commission of bankruptcy issued against &c. But this is to be without prejudice; and it is ordered that the defendants (the assignees) be restrained from making any future dividend of the produce of the *Saxham* and *Caldwell* estates under the said commission without the leave of the Court." Reg. Lib. A. 1810, fol. 1466.

HALFORD v. GILLOW, 10 May, 7 July, 1842. The bill was filed by parties entitled under settlement, of which the defendant, *O. Smoulton*, one of the bankrupts, was a trustee, charging him with a breach of trust, in omitting, out of the income of the trust property, to invest annually a sum of 1000*l.*, according to the terms of the trust. The plaintiffs claimed to prove under the bankruptcy as separate creditors of *O. Smoulton* for 21,795*l.* The proof was refused; but a claim for 15,000*l.* was allowed to be entered. The motion in the cause was then made to restrain the assignees from taking any proceedings in the bankruptcy, or otherwise, in order to making or declaring any further or other dividends or dividend of the separate estate of *O. Smoulton*.

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The cases of *Ex parte Garland* (a), *Ex parte Richardson* (b) *Thompson v. Andrews* (c), and *Cutbush v. Cutbush* (d), which were cited for the Plaintiffs, do not bear upon the question I am now considering. They only go to establish the Plaintiffs' right to proof.

In *Bromley v. Goodere* (e), the bankrupt was dead. The creditors, who had proved under the commission against him, had received twenty shillings in the pound upon their debts. There were other creditors, whose debts had not been established to the satisfaction of the commissioner, but whose debts had not been disallowed. The bill was filed by the creditors against the assignees and others, claiming interest upon their debts as against the heir-at-law and next of kin of the bankrupts. It does not clearly appear whether the executors of the bankrupt were parties; and, as a decree had previously been made in another suit, establishing the right of the heir-at-law and next of kin of the bankrupt to the surplus of the bankrupt's estate in the hands of the assignees, it is possible that the executors of the bankrupt may not have been parties. Lord *Hardwicke*, by his decree, gave interest to his creditors, and also decreed payment of the debts of the creditors, whose debts, though not disallowed, had not been established under the commission. The objection was taken, that the proceeding ought to have been by petition, and not by bill; but Lord *Hardwicke* overruled it. This case appears to be a direct authority for the proposition, that a court of equity may do, by decree, some acts which might have been done under the commission, including that of allowing the proof and directing the payment of debts. But it certainly is no authority for the proposition, that this Court, after an

under the said fiat of bankruptcy, or from paying or distributing or from parting with such separate estate, or any part thereof, or any sum or sums of money, funds, or securities, derived therefrom, to or amongst any of the creditors who had proved, or who should prove, debts under the said fiat in bankruptcy, or otherwise, until further order.

Mr *Richards*, and Mr. *Lloyd*, for the motion.

Mr. *Swanston*, Mr. *Bethell* and Mr. *Ellison*, contra.

The Vice-Chancellor of England refused the motion, without costs.

(a) 10 Ves. 110. (b) Buck, 202, 421; S. C. 3 Madd. 138. (c) 3 Myl. & K. 116.
(d) 1 Beav. 184. (e) 1 Atk. 75.

 1841.—Thompson v. Berham.

adjudication by the Court of Review upon the Plaintiffs' case, will interfere with an order of dividend, only because the Court may doubt the correctness of the adjudication of the Court of Review.

In *Treves v. Townsend* (a), one of the assignees was dead, and the bill was filed against his representative and the surviving assignee for an account. In *Hankey v. Garratt* (b), the bill was filed to determine what constituted the bankrupt's estates as between him and the estate of his deceased partner. In *Ex parte* [*377] *Ruffin* (c), *Ex parte Fell* (d), and *Ex parte Rushforth* (e), questions of specific property were raised, the decision of which necessarily preceded the question of proof and distribution; and the Court only decided that a bill in such cases to determine the rights of parties was more convenient than a petition in bankruptcy. Upon the jurisdiction for such a purpose no doubt could exist.

No other case was cited; and, except the case of *Bromley v. Goodere*, not one of the cases cited can be considered as establishing the jurisdiction now contended for, and that case cannot be considered as affirming the propriety of exercising such a jurisdiction in a case like the present.

I may observe, that, in the decrees of this Court made in suits to which the assignees of a bankrupt are parties, the form is not to direct that the Plaintiff be admitted to prove under the fiat, but that he be at liberty to go in for that purpose.

In these circumstances, I have been led to consider how far the main proposition insisted upon by the Plaintiffs, can safely be relied upon in the present case—I mean the proposition, that this Court has an original and inherent jurisdiction, as being a question of trust, to examine into the proof of debts under a fiat? If the legislature had originally appointed assignees in bankruptcy, without saying under what control or jurisdiction their powers and duties were to be discharged, I should readily admit that the duty of superintending the discharge of those powers and duties must have devolved upon the Court generally charged with the administration of trusts,—

(a) 1 Bro. C. C. 384.

(b) 1 Ves. Jun. 235. See Buck, 210.

(c) 16 Ves. 119.

(d) 10 Ves. 347.

(e) 10 Ves. 409.

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and if such a jurisdiction, for purposes like the present, had once become established, I might be unable to resist [*378] the conclusion, that the general jurisdiction of the Court could not be ousted by the subsequent creation of a court of concurrent jurisdiction. But the question may assume a very different aspect, when it is considered that the character now sustained by assignees in bankruptcy never had existence except in conjunction with the powers of commissioners to control the discharge of the duties of that office; and I cannot but think it at least questionable whether, to the extent of the powers given to the commissioners, contemporaneously with the creation of the office of assignee actually to distribute the bankrupt's property, the jurisdiction in bankruptcy may not have been intended to be exclusive. This suggestion is not without analogy to support it. Where an act of Parliament creates a new right, and at the same time prescribes a mode of enforcing that right, it has, in many cases, been held, that the party claiming the right can only do so by the specific mode which the act prescribes.

The real question is whether—admitting that the assignees in bankruptcy are trustees, and for many purposes undoubtedly they are so, and answerable to this Court—the jurisdiction of the Court of Review is not exclusive for the purpose of determining who are the cestui que trusts,—and to that opinion I very much incline. If that be not so, there is no question of proof of debt, whether of admission or rejection, which the Court of Chancery may not, *ex debito justitiæ*, be called upon to decide, in opposition to the judgment of the Court of Review; and the statute which forbids all appeals from that court, except by a special case, becomes a dead letter. Upon what principle am I to grant the injunction asked by this motion?

Not that of actually overruling the decision of the Court of Review; for no appeal lies from that Court [*379] to this. Not upon any want of jurisdiction in the Court of Review to adjudicate upon the case; for its jurisdiction is undisputed. If I am to grant the injunction, I must proceed upon the ground taken in the argument on behalf of the Plaintiffs, that of treating all the creditors of the bankrupts as defendants to the bill

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represented by the assignees, and restraining them upon equitable grounds from taking the benefit of the dividend declared in their favour. But where is the equity for such interference? This Court no doubt often restrains the exercise of a legal right where that right is subservient to an equitable interest of which a court of law cannot take notice; but in that case, the decree of this Court does not impugn the decision at law, but controls the party personally in the use he attempts to make of that decision, upon the ground that the rights in equity are different from those which are recognised at law. In this case, there is no such ground. I cannot grant the injunction without directly impeaching the decision of the Court of Review,—a court, at least, of concurrent, if not of exclusive, jurisdiction. The circumstance, that a court of equity will grant an injunction upon equitable grounds in cases over which courts of law have, in modern times, assumed a jurisdiction not originally belonging to them, does not alter the principle I am now adverting to. Where a Court, having original jurisdiction over the subject of a suit, has solemnly decided a question, the greatest inconvenience would follow, if another Court, having (if it be so) concurrent jurisdiction, should, as a matter of course, call in question the decision of the former. The sound principle in such cases would appear to be, that whatever questions have been, or might have been decided in the court of original jurisdiction which first adjudicated upon the subject, "should be considered as well decided by a court of merely con-

[*380] current jurisdiction (a). The difficulty of acting upon any other principle is greatly increased, where, as in this case, an independent jurisdiction has been created for the express purpose of adjudicating upon the very questions which arise here,—that of proof and dividend in bankruptcy. Where, then, can the equity be to restrain creditors personally from taking the benefit of an adjudication by a court of competent jurisdiction upon the very same point as that before me?

Upon the whole, without repudiating the jurisdiction of this Court to interfere in cases over which the Court of Review may have juris-

(a) *Eyre v. Everett*, 2 Russ. 352.

1842.—Gardner v. Blane.

diction also, I do not see my way to grant the injunction in this case, upon the principle upon which it is *asked*, without committing myself to the proposition, that it is the duty of this Court to examine every adjudication of the Court of Review upon proof of debt or otherwise, at the instance of every creditor or claimant who may be dissatisfied with the decision of that Court. I do not know how I could then refuse to hear a cause, which, after payment of a dividend, sought to compel creditors to refund what they had received, upon the ground that the payment was a misapplication of trust monies. If this is to be done, the precedent for it should emanate from the highest authority in the law.

The motion was refused with costs.

The motion was renewed before the *Lord Chancellor*, and the injunction was refused. The case was afterwards brought before the *Lord Chancellor* upon a special case by way of appeal from the court of review

*GARDNER v. BLANE.

1842: January, 22, 24.

The appointment of a testamentary guardian of an infant by his father, does not, under the stat. 12 Car. 2, c. 24, constitute any objection to the appointment of a receiver of the infant.

THE suit was by an infant against his testamentary guardians, who were also executors under the will of the father, for an account of the rents and profits of the real estate of the infant, received by the Defendants, and for a receiver. The decree was made, and the balance found to be in the hands of the Defendants was paid into Court. The cause came on for further directions.

Mr. *Teed*, for the Plaintiffs.

Mr. *Bartrum*, for the Defendants, the testamentary guardians,
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asked that one of them (the Rev. *G. Bradley*) might be appointed receiver, without being required to give security.—The will, appointing the Defendant guardian and executor, had placed the person and estate of the infant under his protection. The stat. 12 Car. 2, c. 24 (a), empowered the father, by will, to dispose of the custody of his children during their minority, and enacted that the person to whom that custody is given shall take also into his custody to the use of the children the profits of their lands, and management of the personal estate, and bring such actions as, by law, a guardian in socage could bring. The Court had not, therefore, jurisdiction to take the management of the estate from the person to whom the father, in the exercise of his power under the statute, had given it.—He added, that the Defendant was willing to be receiver without salary.

THE VICE-CHANCELLOR ordered, that the Defendant [*382] should be appointed receiver without salary, and without being required to give security; observing that it was not unusual, where no salary was given, to dispense with the security, and that there were sufficient reasons in this case for not requiring it. His Honor said, he desired it to be understood he did not make the order on the ground which had been urged at the bar. The statute enabled the father to give to the testamentary guardian certain powers—but the precise extent of those powers over the property of the infant was by no means certain. The testamentary guardian had no estate, and was frequently unable to act effectually without the assistance of this Court (b).

(a) Sects. 8. 9.

(b) On the office and power of the testamentary guardian, see *Ingham v. Bickerdike*, 6 Madd. 275, and cases in the note (a); *Re Swifts*, 2 Molloy, 330; *Re Lewis*, Id. 485; *Arnott v. Bleasdale*, 4 Sim. 387; *Villars v. Mellish*, 2 Swanst. 536—539, and cases there cited; *Ex parte Champney*, Dick. 350; *Mellish v. De Costa*, 2 Atk. 14; *Hanbury v. Walker*, 3 Ch. R. 51; *Yates v. Carr*, Nels. 2; *Corcellis v. Corcellis*, Id. 200; *Hannam v. Hannam*, Id. 323; *Dormer v. Dormer*, Id. 438; *Bridget Hyde's case*, 8 Salk. 177; *Style*, 456; *Roberts v. Roberts*, Hardr. 96.

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*JONES v. HUGHES.

[*383]

1842: January, 14, 17, 26.

Equity confessed in the answer.

The goods of the Defendant, and the lease of certain premises belonging to him, were taken in execution under a *fi. fa.* and sold: the Plaintiff became the purchaser of the term, and was put into possession of the premises by the sheriff, but no assignment of the term was otherwise made. The Defendant afterwards brought ejectment and recovered. The Plaintiff filed his bill to restrain proceedings in the ejectment, and moved for the injunction upon the answer, by which the Defendant admitting the Plaintiff's case, insisted upon alleged irregularities in the execution of the *fi. fa.*, which, it was argued, rendered the proceedings in that execution invalid at law. The Court granted the injunction, with liberty to the Plaintiff to take such proceedings at law as he might be advised to perfect his title.

THIS was a motion for an injunction to restrain the Defendant from entering up judgment on a verdict in ejectment, brought to recover certain leasehold premises, or taking out execution against the Plaintiff thereon, or further prosecuting the action, and from commencing or prosecuting any other proceedings at law against the Plaintiff for the recovery of the same premises, or otherwise in relation thereto.

The motion was made after answer. The answer stated or admitted that the Plaintiff obtained a verdict in an action in the Court of Common Pleas, at Lancaster, against the Defendant for the sum of 3*l.* 3*s.* damages and 40*s.* costs. On the 20th of April, 1839, judgment was entered up against the Defendant for the damages and costs, and the costs of increase, which were taxed at 50*l.* 6*s.* 4*d.*, making in the whole a judgment for 55*l.* 9*s.* 4*d.* Afterwards, on the same day, the Plaintiff sued out of the said Court a writ of *feri facias*, directed to the then sheriff of the county of Lancaster, indorsed to levy the said amount. The warrant of the sheriff, for the execution of the writ, was duly made out and delivered to his bailiff at Liverpool, where the Defendant was possessed of a leasehold interest in a parcel of land (the premises in question) for the residue of a term of 14 years, subject to a ground rent. The sheriff's bailiff entered upon and took possession of these premises in execution of the writ of *feri facias*; and, on the 26th of April,

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1839, he caused the same premises, and the estate and interest of the Defendant in them, and also all the Defendant's furniture, effects, goods, and chattels thereon, to be put up for sale by auction.

[*384] The answer alleged, that the Plaintiff having conceived the design of obtaining possession of the premises at a price much less than their real value, for that purpose caused the sale to take place at the hour of ten in the morning, notwithstanding the intreaties of the Defendant that it might be postponed: that the Plaintiff, by an agent, himself became the purchaser of the leasehold premises: that the entire proceeds of the sale amounted to only 184*l.* 8*s.* 8*d.*, although the term itself was worth at the least 300*l.*, and the lease contained a covenant by the lessor to renew the term, or pay for the improvements, and also a proviso giving the lessee a right of pre-emption of the fee, at a stated sum, whereby the value was greatly increased: that the premises were occupied as separate tenements, and it was unnecessary to sell the whole to raise the sum of 55*l.* 9*s.* 4*d.* and costs; and that the value of the furniture and effects was not less than 35*l.*

The answer admitted that, on the day after the sale, the Plaintiff, after retaining so much as he claimed in respect of his debt and costs, paid the balance, amounting to 103*l.*, to the sheriff's bailiff, and the bailiff paid over the same to the Defendant; the Defendant (as he alleged) not being then aware that the sale was otherwise than legal and proper: that, on the same day, the sheriff's bailiff obtained possession of the lease, and turned the family of the defendant out of possession, and gave possession of the lease and of the premises to the Plaintiff.

The Plaintiff did not procure any assignment of the leasehold premises to be executed by the sheriff. By his bill he stated that he neglected to do so until after the sheriff had gone out of office, and afterwards he found so many difficulties in obtaining the assignment that he resolved to rely upon his possession. The

[*385] Defendant, by his answer, alleged that it was his belief that the cause of the absence of the assignment was, that the sheriff, or his officers, considered the sale to have been improperly made, and therefore refused to execute the assignment.

The answer stated, that, in August, 1840, the Defendant offered

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to pay the Plaintiff the sum for which the premises sold, and all expenses, if the latter would restore possession, which he refused: that, on the 19th of February, 1841, the Defendant had brought an action of ejectment against the Plaintiff for the recovery of the said leasehold premises; that the action was tried at Lancaster, and the jury, under the direction of the Judge, that the Plaintiff (Defendant in ejectment) had no estate in the premises, found a verdict for the Defendant (Plaintiff at law (a)).

*The bill filed on the 29th of October, 1841, prayed a ['386] declaration that the Plaintiff was entitled to the full benefit of the lease, and to possession of the premises for the residue of

(a) The following is believed to be an accurate note of the proceedings at law:—*Doe dem. Hughes v. Jones.* Ejectment: Lancaster Summer Assizes, 1841. On the part of the Plaintiff the demise of the premises by the owner to *Hughes*, in 1827, for a term of 14 years, and possession, and payment of rent, under that demise, until 1839 were proved. It was also proved that, in 1839, the lease and other goods of *Hughes* were taken in execution by the sheriff under a *fi. fa.*, and the same were sold and purchased by *Jones*, who was put in possession and paid rent to the owner. It did not appear that the sheriff executed any assignment of the lease.

Wightman, J., was of opinion that, in the absence of any assignment in writing to *Jones*, the Plaintiff must recover; and, under that direction, the jury found a verdict for the Plaintiff.

Exchequer of Pleas, Mich. T., 1841.. *Dundas* moved for a new trial, on the suggestion of misdirection, and cited *Doe v. Donston*, and *Gilbert on Executions*, (ubi sup.).

The Court refused the rule nisi for a new trial; but granted a rule to shew cause why a nonsuit should not be entered, on the ground that, though the Defendant could not in law justify his possession, yet it did not follow that the Plaintiff was entitled to recover the premises.

Watson, on a subsequent day, shewed cause, and argued that, by the Statute of frauds (29 Car. 2, c. 3, s. 3), the assignment must be in writing. The sheriff by the execution acquired only a power, and not property, in chattels real. *Palmer's case*, 4 Rep. 74; *Palmer v. Hamp'rey*, Cro. Eliz. 584; *Rex v. Dean*, ubi sup.

Dundas, in support of the rule, insisted that the property was changed by the execution and sale. *Higgins v. McAdam*, 3 Y. & J. 1; *Giles v. Grover*, 9 Bing. 128; 12 Pri. 2; *Stratford v. Twyman*, Jac. 418; *Doe v. Donston*; *Taylor v. Cole*, ubi sup. *Doe v. Carter*, 8 T. R. 57; *Scain v. Morland*, 1 Brod. & Bing. 370.

Lord Abinger, C. B., *Alderson, B.*, and *Gurney, B.*, held, that the sheriff had only a power to assign, and had not the property in the lease, and that the parol assignment did not divest the legal title of the Plaintiff in the ejectment. If there was any hardship, the Defendant could only have his remedy in equity.

The rule was discharged.

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the term, until the Plaintiff should, or in case he should not, obtain the assignment from the sheriff: it also prayed an injunction to the effect of the present motion.

Mr. *Wakefield* and Mr. *Anderson*, for the motion.

The equitable title of the Plaintiff as the purchaser of the premises is clear; it wants only the legal formality of the assignment. It is within the ordinary principle of equity to prevent a party from availing himself, or making an unconscientious use, of an accidental defect of title in another. The Plaintiff is at least entitled to protection in the interim, until he shall have had an opportunity to take proceedings for completing his title.—They cited, on the effect of the execution, 2 *Tidd, Pract.* p. 1043.

Mr. *Sharpe* and Mr. *Kenyon*, for the Defendant.

This is an attempt to sustain in equity a title under [*387] *an irregular execution, which the Plaintiff could not uphold in a Court of law. The proceedings under the execution were wrong. Under the writ of *fieri facias*, the sheriff ought to have executed an assignment of the term. *Rex v. Dean*, (a). On the sale of a lease or a term by the sheriff, under a *fi. fa.*, he is not to put the tenant out of possession; but the assignee may, if necessary, bring his ejectment. *Pullen v. Purbecke* (b); *Taylor v. Cole* (c). In this respect the proceedings under a *fi. fa.* differ from the proceedings in *elegit*. The course taken has not, therefore, given the Plaintiff any legal title to the premises. The sheriff, although now out of office, may, if he thinks proper, execute the assignment. *Doe dem. Stevens v. Donston* (d). The property sold was far more than was necessary to levy the debt and costs. *Congham v. King* (e). The sale was effected at an hour very improper for that purpose, and at an under value. *Keightley v. Birch* (f). If the assignment had been made, the Defendant would have had his remedy against the sheriff; but the answer of the sheriff, under

(a) 2 Show. 85, pl. 74.

(d) 1 B. & A. 230.

(b) 1 Lord Raym. 346.

(e) Cro. Car. 221.

(c) 3 T. R. 292.

(f) 3 Campb. 531.

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the existing circumstances, would be, that he had done no act to give title to the Plaintiff, and that the Defendant was at liberty to treat the whole proceedings as a nullity. The Court is asked for a perpetual injunction, which would be tantamount to a decree that the sheriff shall assign the term ;—and the Court is thus called upon to confirm and give validity to the acts of the ministerial officer of another Court, not only without knowing that the officer has done his duty, but upon the statement in the answer which shews that his acts are such as would not be confirmed by the Court out of which the process issued.

"The object of the Plaintiff is to evade the trial in the [*388] proper Court of the irregularity of the execution ; or why is not an application made in a Court of law against the sheriff to compel him to make the assignment ? The effect of the injunction would be to give the Plaintiff all he requires, and deprive the Defendant of the benefit of the sheriff's liability. The whole question is matter for a Court of law.—They cited also *Gilbert on Executions*, p. 20.

Mr. Wakefield, in reply :—

The proceedings at law must be assumed to have been regular ; for if not the Defendant would have had his remedy at law. Even an irregularity in the execution, though it might create a liability in the sheriff, would not affect the purchaser under it. The Plaintiff has paid his purchase money, and acquired an equitable title, and, but for an omission of duty in the officer of the Court of law, would have acquired also a perfect legal title. *Fitzherbert, Natura Brevis* (a).

VICE-CHANCELLOR :—

In this case such proceedings have been had as *prima facie* to shew, that the Plaintiff in equity is entitled to enjoy the property which the Defendant in equity seeks to recover in ejectment. The

• (a) Page 248, H., (7th ed. p. 561.)

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Defendant in equity says, there are circumstances of conduct on the part of the Plaintiff which (whatever the effect of such circumstances may be at law) ought to prevent this Court from moving in his favour, so as to deprive the Defendant of any advantage [*389] which the law may *give him. It is, however, admitted that the question, which those alleged circumstances of conduct are supposed to raise, cannot be raised in the trial of the ejectment. The ejectment, therefore, will decide literally nothing between the parties, except the abstract question in whom the legal estate may be. This is precisely the case in which a Court of equity most commonly acts in restraining the exercise of a mere legal right, in order that the real question between the parties may be put in a train for adjudication. And as the facts, which shew this state of circumstances, are admitted by the answer, there is in this case (in the language of the Court) an equity confessed in the answer, such as to entitle the Plaintiff to an interim injunction, unless the nature of the case in any other respect would make it improper or inconvenient that the injunction should be granted.

The objections suggested to the injunction being granted are, first, that the case will impose upon this Court the necessity of deciding upon the regularity of the proceedings in a Court of law, in which Court it was said, the Plaintiff in equity might long since have had, and might now most conveniently have the question between the parties decided; and, secondly, that, by granting the injunction, I should give the Plaintiff in equity the benefit of an assignment from the sheriff, without subjecting the sheriff to the consequences (at the suit of the Defendant) of having actually executed such an assignment. Both these points will require consideration at the hearing of the cause, and are material in determining the course which, for the Defendant's protection, ought now to be pursued in granting the injunction. If the cause were now at the hearing, I should probably, as the most convenient course, retain the bill, with liberty for the Plaintiff to proceed [*390] at law to perfect *his legal title to the property; and there is no reason why he should not be at liberty to take such proceedings now. I shall, therefore, grant an interim injunc-

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tion to restrain the Defendant from proceeding in the ejectment, without prejudice to any proceedings which may be necessary on his part to recover the costs of the proceedings at law in which the Plaintiff failed ; and the Plaintiff must have liberty to take such proceedings as he shall be advised to perfect his title to the premises at law.

COOK v. BLACK.

February 10 and 11.

A debtor effected an insurance on his life, one condition of the policy being that, if it should be assigned bona fide, the assignee should have the benefit of it, so far as his interest extended, notwithstanding the assured should commit suicide : he deposited the policy with his creditor, accompanied by a letter, promising to assign it to him, when requested, as a security for his debt. No notice of the assignment was given to the assurers. The debtor committed suicide.

Held, that inasmuch as the deposit of the policy, and the agreement to assign it by way of security for a debt, constituted in equity a valid assignment as between the parties to the transaction, it was also an effectual assignment within the condition, as against the assurers

J. C. BOWTALL effected an insurance upon his life, with the Britannia Life Assurance Company, for the sum of 700*l.*, in May, 1838. One of the conditions of the policy was, that, "If the person assured commit suicide, and the policy shall have been assigned to any person or persons having a bona fide interest in his life to the extent of the sum assured, the full amount will be paid to the party or parties so interested ; if the interest be less than the sum assured, the party or parties will be indemnified to the full extent of such interest." The Plaintiff, to whom *Bowtall* was indebted at the time of the effecting the insurance, paid the premium upon the policy, and *Bowtall*, in July, 1838, wrote and gave to the Plaintiff the following letter :—

" July 20th, 1838.

" Dear Sir,—I will leave in your hands a policy of assurance for 700*l.*, effected by you for me in the Britannia Life Assurance Company, numbered 628, for collaterally securing to you the payment

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of the sum of 260*l.* due and owing by me to you ; and
 [*391] also any other sum *or sums of money that may at any
 time hereafter be due to you from me upon bills of ex-
 change or otherwise ; and I will assign the same to you whenever
 requested so to do, at my own expense.

“ Yours truly,

“ *J. C. Bowtall.*”

The policy was deposited with the Plaintiff, who made further advances to *Bowtall*, and received bills of exchange from him ; but gave no notice to the assurers of any assignment of the policy. In February, 1839, *Bowtall* committed suicide.

The bill was filed against the directors of the Britannia Life Assurance Company and the administratrix of *Bowtall*, for an account of what was due to the Plaintiff, in respect of his advances to *Bowtall* on the security of the policy, and for payment by the assurers : it also prayed, if necessary, an account of the personal estate of *Bowtall*, against the administratrix.

The Defendants did not admit the debt, or the assignment of the policy, and evidence of the consideration for the bills of exchange was given.

Mr. *Sharpe* and Mr. *Shapter*, for the Plaintiff.

The rule, with respect to notice, does not apply, as between the parties themselves. It is not necessary to the valid assignment of a chose in action that notice should be given to the debtor. *Vacher v. Cocks*(*a*). Demand for payment is sufficient. It is between several incumbrancers, or against assignees in bankruptcy or insolvency, that notice becomes important. *Row v. Dawson* (*b*) ; *Edwards v. Scott* (*c*).

[*392] *Mr. *Lloyd* and Mr. *Bacon*, for the Directors of the Assurance Company.

(*a*) 1 B. & Adol. 153.

(*b*) 1 Ves. 31.

(*c*) 1 Man. & Grang. 962.

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The Defendants do not insist upon the necessity of notice as between the assignor and assignee; but they refer to the absence of notice, as evidence tending to shew that there was not in fact any assignment for value. The letter relied upon does not amount to an assignment within the terms of the condition. It is, at the utmost, only an agreement to assign; and although, as between the assignor and assignee, and all persons claiming under them, equity would disregard the form of expression, and consider that as actually done which was agreed to be done, yet the Defendants are not privies to the assignment, and are not within the range of the consideration. The Court compels the specific execution of agreements against persons who are not parties to them, only on the ground that they are affected by the consideration. So far as the Court requires a consideration to be shewn, before it interferes to enforce an agreement,—to that extent there is no equity for giving effect, as against the assurers, to the agreement to assign the policy, for there is a failure of consideration for *that* agreement, as regards them.

Mr. Sharpe, in reply. *

The letter operates, not as an agreement to assign, except perhaps in so far as the Plaintiff might, as against the assured or his representatives, elect to treat it as such an agreement, and call for a more formal assignment; but it operates as an actual assignment. The same rule prevails, even in the strict construction of a Court of law. An agreement to execute a lease, if it contains all the terms of the demise, is not the less an actual demise, because it is expressed in the future tense: if it otherwise operates as a demise, the prefix "I will" does not vitiate it (a).

The VICE-CHANCELLOR:—

I entertain no doubt that the Plaintiff is entitled to the decree in

(a) *Harrington v. Wise*, Cro. Elis. 186; *Stainforth v. Fox*, 7 Bing. 590, and cases there cited.

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this case, although, under the circumstances, the Company were justified in putting him to strict proof. Assuming the debt to be due, the first question is, how would the case have stood between the Plaintiff and *Bowtall* himself? The effect of the transaction was to give the Plaintiff, in this Court, a right to receive payment of his demand out of what was due on the policy; and if the estate of *Bowtall* had become entitled to the money in the event of his natural death, it is quite clear, that, not only as against that estate but as between the assurer and the assured, the Plaintiff would have been entitled to be paid out of the sum payable upon the policy. Whether the right accrued by a mere deposit of the policy, or by a formal assignment, can make no difference: the effect in equity is to give the party taking the security all that an assignment would give him: the letter does, in fact, assign the benefit of the policy. A transaction, whereby the assured gives to a person lending money to him a right to the re-payment of that money out of the money which is to become due in respect of the policy, is in truth an assignment. Is it then such an assignment as the third condition requires? The contract is rational upon that construction. The

meaning of the condition is, that the assured shall have [*394] the power of assigning the policy so effectually *that a person advancing money upon it shall retain his security unimpaired, notwithstanding the assured might commit suicide; and, by this condition, the policy is rendered more valuable as a negotiable security. Any dealing between the assured and another party, which would constitute that party an assignee of the policy, would entitle him to the full benefit of it. Upon that interpretation the condition is intelligible. Strictly, there can be no legal assignment of a policy; and why am I to look upon the dealing that has taken place with respect to this policy, and which amounts to an assignment in equity, as yet, from some impropriety in form, not being an assignment within the condition? The words of the condition are,—“ If the policy shall have been assigned ”—I cannot read these words as importing a stipulation for any particular form of assignment. I must construe the terms of the condition as I construe the words of the letter,—that the Company will pay the

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amount of the policy to a third person, who has bona fide advanced his money, and taken that security. It was properly admitted in argument, that notice to the assurers was not of the essence of the assignment; but it was said that the absence of notice was evidence that there was in truth no valid assignment. That is not such evidence as would justify me in holding that the Plaintiff is not entitled to be paid the amount of his debt by the Defendants out of the sum in which the life of the debtor was insured upon the policy.

The debt is not at present established: it will depend upon the result of the account. The Defendants may also have an inquiry whether the Plaintiff has any securities for his debt other than the policy.

*ATTORNEY-GENERAL v. THE MAYOR, ALDERMEN, and [*395]
BURGESSES of NEWARK-UPON-TRENT.

February 14, 15.

By the decree made on an information which was filed for an account of certain charity estates, it was, by mistake, ordered, that an estate belonging to another charity should be sold. The estate was contracted to be sold under the decree, but the purchaser was afterwards discharged. Another information was then filed, suggesting that it would be beneficial to the latter charity to resell the estate, and praying, amongst other things, an inquiry as to that fact.

Held, that the Court ought not to decree the sale of a charity estate, except upon a very special case; and that so much of the second information as sought to obtain an inquiry preparatory to that decree, in the absence of any special case for it, must be dismissed.

In 1829, an information was filed against the mayor and aldermen of the borough of Newark-upon-Trent, for the purpose of ascertaining and distinguishing the estates of several charities (not including a charity founded by *Anthony Collingwood*), and to have the respective trusts of such estates declared and carried into effect. By the decree made in 1830, an account of the several estates was directed, and also an inquiry whether the Defendants had any lands,

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tenements, or hereditaments, or any chattels, real or personal estate, whereby they could answer "what should be coming upon the said accounts." By the report in July, 1833, the Master found that the Corporation was entitled to the site and materials of a dwelling-house in Newark-upon Trent, recently pulled down, and which was, in 1678, devised by the will of *Anthony Collingwood* to the said mayor and aldermen to the use of the poor of the Corporation. By the decree in August, 1833, on further directions, it was ordered that the site and materials of the said dwelling-house should be sold,—that all parties should join in the sale as the Master might direct, and the purchase-money be paid into Court. The site and materials of the house were accordingly sold in four lots, three of which were bought by *J. Wright* for 807*l.*, and one by *T. Massey* for 115*l.* Another information was filed in 1836, stating, that, since the decree, it had been ascertained that the said house and premises had been devised by *Anthony Collingwood* to the said mayor

[*396] and aldermen to the use of the poor of the Corporation; that the house had been let at a rent of 50*l.* per annum, of which 8*l.* 11*s.* 9*d.* had been distributed to the poor, and the remainder applied by the Corporation to their own use; and that, in the present condition of the premises, and under all the circumstances, it would be beneficial for the charity that the premises should be sold. The prayer was for a reference to inquire of the expediency of confirming the sale, and how much of the costs of the first suit had been properly incurred for the benefit of *Collingwood's* charity, and for payment out of the property of that charity, and the application of the surplus according to the trusts. It was thereby also prayed, that the suit might be deemed and taken, if necessary, as supplemental to the first suit. The latter information was not prosecuted to a decree, owing to the operation of the Municipal Corporation Act (a) in divesting the Defendants of their interests in the charity estates. *J. Wright*, one of the purchasers under the former sale, in the mean time moved to be discharged, and was discharged from his purchase.

New trustees of the charity estates having been appointed, a sup-

(a) 5 & 6 Will. 4, c. 76.

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plemental information was filed, in 1840, against the Corporation, and the new trustees of *Collingwood's* charity, and of the charities comprised in the first information, stating the foregoing proceedings, and stating also that the Corporation claimed the legal estate in the lands and premises belonging to the several charities; and praying an inquiry, whether it would be proper, and for the benefit of *Collingwood's* charity, that the premises from the purchase of which *J. Wright* had been discharged, should be resold, and, if so, that the same might be resold, and the Defendants ordered to join in all necessary acts for that purpose; and that it might be ascertained and declared in whom the legal estate of the said charity estates was vested, and that "proper directions might be [*397] given for vesting the same in the Defendants, the trustees.

The answers admitted that the said proceedings had taken place. The Corporation claimed such estate as was vested in them, and submitted to the Court the question whether they had any such estate.

Mr. Spence and *Mr. Blunt*, for the informant, relied on the admitted circumstances in which the property in question was placed, as shewing at least *prima facie* that it must be for the benefit of the charity to convert it into a fund or other productive shape; and as, therefore, making a sufficient foundation for an inquiry whether a sale would or not in fact be beneficial. That the Court had jurisdiction and power to order a sale, would be beneficial to the charity, was, they argued, apparent, inasmuch as decrees for such sales were not unfrequent in modern practice, and the propriety of such a course had been always admitted by the highest authorities in later times,—*Sir William Grant*(a), *Sir Thomas Plumer* (b), *Lord Brougham* (c), and *Lord Langdale*. The Master of the Rolls observed that "it has been truly said, that, when a considerable benefit would be gained to a charity, the Court itself would order an alienation of

(a) *Attorney-General v. Cross*, 3 Mer. 539.

(b) *Attorney-General v. Warren*, 2 Swanst. 302.

(c) *Attorney-General of Ireland v. Hungerford*, 8 Bligh, N. S. 437; C. S. 2 Cl. & Fin. 357.

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charity property (a).” And the language of Lord *Eldon*, in the *Attorney-General v. Brooke* (b), led to the same inference.—They cited also the *Lewes Case*, mentioned in the argument of the *Attorney-General v. Warren* (c).

[*398] *Mr. *Skirrow*, for the new trustees.

Mr. *Bird*, for the Corporation.

VICE-CHANCELLOR:—

It appears that this case had its origin in another information which was filed by the *Attorney General* against the Corporation, for the protection of certain charities, among which the *Collingwood* charity was not included. Upon that information a decree was made for the benefit of the charities that were the subject of it, and the decree directed an enquiry of what property the Corporation had other than charity property to satisfy any demand which the Corporation should be found liable to answer. I find that a like decree was made in the case of the *Attorney-General v. The Bailiffs and Burgesses of East Retford* (d). It was stated that Lord *Cottenham* had disapproved of that form of decree, and certainly, although not an unprecedented, it is an unusual form, especially with the object of directing a sale of any property which should be found. A corporation, like other parties to a suit, is subject to have a decree enforced against it by ordinary process. A distringas is the ordinary and proper mode of enforcing it in the case of a corporation (e); but it is not on the form of the decree in this respect that any question now arises. It appears that the Master made the enquiry, and reported that the Corporation was possessed of property, part of which is the subject of the present information. Upon this report, a decree was made, which directed a sale of this property to satisfy what was due to the charities on *whose behalf the

[*399] information was filed; and under the decree the proper-

(a) *Attorney-General v. Kerr*, 2 Beav. 428.

(c) 3 Swanst. 300.

(e) See *Dev. Chan. Prac.*, Vol. I., p. 190 et seq.

(b) 18 Ves. 326.

(d) 2 Myl. & K. 39.

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ty was sold. After the sale had actually taken place, the *Attorney-General* discovered that 'the property, which had been sold to satisfy the demand of the first set of charities, in fact belonged to another and different charity, namely, that created by *Anthony Collingwood*. The present information, which has been styled a supplemental information, stating these facts, and wholly departing from the purpose of the original information, suggests that it will be for the benefit of the *Collingwood* charity itself that those sales, erroneously directed in the first instance, should stand, and prays reference to the Master to enquire whether that course ought to be taken or not.

I suggested, during the argument, that there were difficulties in the way of making the decree which is asked, even in point of form,—for at present there is a decree for the sale of the property for the benefit of the charities that are represented in the first information, and no step seems to have been taken to get rid of that decree. The difficulty of form is, perhaps, not so great as I at first apprehended, for, according to the observations of Lord *Langdale* in the case of *Attorney-General v. Brettingham (a)*, the *Attorney-General* may at any time stay the proceedings in an information; and therefore he might stay these proceedings so far as they relate to this particular property. Nor is the difficulty perhaps materially increased by the fact of the sales having taken place,—the purchasers having notice that they were dealing with the property of a charity. The merely formal obstacles might therefore perhaps be overcome without incurring the expense of a rehearing. I say this, not to advise any particular course of *proceed- [*400] ing, but merely to remove any impression which my remark might have created, that I now proceed upon the ground that the difficulties of form are insuperable. I have no doubt that, by arrangement, the original proceedings with regard to this property might be effectually stayed.

The substantial question however is, whether,—whatever the former proceedings might have been,—I am upon this information to direct an inquiry whether it would be for the benefit of the *Colling-*

(a) 3 Beav. 95.

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wood charity that the sale should be effected. That reference of course assumes that it is proper for the Court to sell the lands, if the sale should appear to be beneficial.

It was said in argument, that the Court had clearly power to direct a sale of the lands of a charity. I do not doubt the existence of this power in the Court: the trustees have the power to sell at law: they can convey the legal estate; and it is only a Court of equity that can recall the property; and if that Court should sanction a sale, it would be bound to protect the purchaser. The question is, not upon the existence of the power, but whether the Court would be right in exercising such a power.

Now the only case which I have known in my own practice where this was actually done, was that of the *Attorney-General v. Nethercoat (a)*. There the Court ordered the charity estate at South Molton, or a great part of it, to be sold, and the consequence was that fourteen cottages were sold in fourteen lots. The [*401] same number of abstracts were delivered to the purchasers, and the expense of the sale nearly swallowed up the purchase-money. I am informed that the charity has wholly disappeared. The lands have passed into the hands of the purchasers, and the money is gone. That case is, at least, a caution against selling charity lands under the notion of benefitting the charity, except under very special circumstances.

The case of the *Attorney-General v. Brooke (b)* came before the Court, upon the question whether a lease renewable for ever of the land of a charity could be good; and the language of Lord *Eldon* in that case goes very far to shew his opinion, that a sale of trust property is a proceeding which the Court may have the power to direct, but which it ought not to direct.

In the *Attorney-General v. Buller (c)*, Lord *Alvanley*, upon the Master's report, that it would be beneficial to the charity, directed that the estate should be sold (*d*). The case came on, upon excep-

(a) Not reported. The cause was heard on the principal questions, as they affected the Defendants, before the *Vice-Chancellor*, 10th, 11th, 12th, and 13th of March, 1840. Several prior and subsequent proceedings were had in the cause. See ante, p. 316, n. (a).

(b) 48 Ves. 320.

(c) Jac. 407.

(d) Id. 408.

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tions, before Lord *Eldon*, who said that the Court must have been surprised into making the order for the sale of the estate. "Even an act of Parliament would not go so far: acts are sometimes passed to authorize the exchange of an estate belonging to a charity for another, but not to convert it into money (a)". It is clear, therefore, that Lord *Eldon* considered an act of Parliament to be proper if not necessary in order to authorize the Court to decree a sale of a charity estate; and I should have thought that a question on this point could scarcely have been raised; for when a trust is once fixed upon a property, the Court has no right to say it will change the nature of that trust. Such an act of the [*402] Court would be extra vires, unless in a very special case.

The cases that strongly illustrate the principle,—cases of daily occurrence,—are those in which the Court has held that even a grammar school could not be altered or diverted from its strict purpose. The reason always assigned has been, that the doner, having a right to give his property as he pleased, had chosen to give it for a particular purpose; and, then, what right had a Court of equity to change that purpose? It was not until the cases of the *Attorney-General v. Dixie* (b), and the *Attorney-General v. The Haberdashers Company* (c), that the Court of Chancery went so far as to say, that instruction in writing and arithmetic might contribute to the purposes intended by the founder of a grammar school, and promote the objects of the foundation. It was upon that principle only that such instruction, not expressly comprehended in the original destination of the gift, was allowed to be introduced. The cases all proceed upon the principle, that the Court has no right to vary a trust. I mention those cases because it appeared to me that the alienation of the lands of charities was spoken of at the bar much too lightly, and as a matter of course. [1]

(a) Id. 412.

(b) 3 Russ. 584, n.

(c) Id. 530.

[1] Where an act of Parliament authorized the application of the surplus funds of a charity in one way, the Court has jurisdiction to authorize a reference to a Master to enquire as to the expediency of applying for another act of Parliament to authorize the application of the surplus in a different manner. In re *The Shrewsbury Grammar School*, 1 Hall & Twells. 401.

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I was referred, indeed, to cases in which it was said, that what is now asked had been done. The cases, with the exception of the *Attorney-General v. Nethercoat*, so far as they are reported, are of this description: the Court having been called upon to set aside long leases, as improvidently granted, and as amounting, in fact, to a sale of lands, has inquired whether those leases were provident and proper, regard being had to the time when they were granted. The leases might have been a proper course of management: there may not have been any greater departure from the purposes of the gift in granting a lease for many years' duration, than there would have been in granting it for a shorter duration. A building lease must, of necessity, be for a number of years. That is the principle upon which the Court has always gone in those cases, although, in reasoning upon them, the Court, it is true, has intimated that even the alienation in fee of charity lands might be supported. In the cases of the *Attorney-General v. Warren* (a), *The Attorney-General v. Kerr* (b), and the still later case of the *Attorney-General v. Brettingham* (c), similar remarks have arisen in the same way. In discussing the question whether a charity lease should be set aside, (and in most of the cases it was set aside), the Court has said only in the abstract, that it had the right and the power to sell charity lands. In the *Attorney-General of Ireland v. Hungerford*, in moving the judgment of the House of Lords, Lord Brougham said that there might be circumstances in which the alienation in fee of the land of a charity would be proper; and he put the case of a neighbouring and opulent landed proprietor, who should offer 1000*l.* for a small corner of a field, worth only a few shillings to the charity to which it belonged, and inquired whether, in such a case, the Court or a trustee might not providently sell it (d)? It is extreme cases like these that the Court suggests, for the purpose only of asserting its jurisdiction in special and particular circumstances.

In this state of the authorities, observing also the language of

(a) 2 Swanst. 291, 302.

(b) 2 Beav. 420.

(c) 3 Beav. 91.

(d) 8 Bligh, N. S., 487; 3 Cl. & Fin. 374.

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Lord *Eldon* in the case of the *Attorney-General v. Mayor of Bristol* (a), I cannot treat it as a mere *matter of [*404] course, to direct an inquiry whether the sale of an estate would be beneficial to the charity to which it belongs. That is the only question I have now to decide ; and in deciding it, I am not called upon to controvert what the learned Judges have said,—that the Court may in certain cases decree such a sale. I have only to determine whether the inquiry must be directed simply as a matter of course, because it is asked. So far from this, it appears to me that there is a very strong objection to that course in the present case. The proceeding has been begun and carried on hitherto entirely on behalf of other charities. Then the sale having taken place on an information filed for a totally different purpose, but still carrying on the same object, the *Attorney-General* diverges into an inquiry whether that sale, which was confessedly irregular, may not be for the benefit of the *Collingwood* charity. There is not in this information any fact suggested upon which the Court can form an opinion. It simply states that the sale has been illegal, and without stating any special circumstance, it suggests that it will be for the benefit of the charity to sell again, and prays the inquiry. I have no doubt that such an inquiry ought not to be made except in a very special case. I am not presuming to question the correctness of what is laid down in the cases I have referred to,—that the Court may decree the sale, which I think only means that extreme cases may occur where that interposition would be proper.

The principal object of the new information is, to carry on the old one, and as to that the usual decree in the supplemental suit may be made: this will give the information all its effect, so far as it is an information against the new trustees under the Municipal Corporation Act. As to the residue of the suit, the information must be dismissed.

(a) 2 J. & W. 294.

 1842.—*Tipping v. Power.*

[*405]

*TIPPING *v.* POWER.

1842: February 18. March 8, 10.

In a suit by a simple contract creditor, whose debt was secured by a deposit of deeds by way of equitable mortgage, against the executors and devisees of the debtor, the mortgaged premises were sold, and were not sufficient to pay the Plaintiff's debt. The general assets of the testator were insufficient to pay his debts and the costs of suit: The parties beneficially entitled under the devise by their answer disclaimed, but the bill was not dismissed against them.

Held, that the Plaintiff as equitable mortgagee was entitled to the proceeds of the sale of the mortgaged premises, and the executors of the testator were entitled to retain in full out of the general assets the debts owing to them by the testator, and that the residue of the assets should be applied in the following order:—in payment,—first, of the costs of the executors, as between solicitor and client; secondly, of the costs of the Plaintiff (including those of the purchaser, which the Plaintiff was ordered to pay); thirdly, of the costs of the Defendants beneficially entitled under the devise; and fourthly, of the debts remaining due to the Plaintiff and the other creditors.

THE Plaintiff sold and conveyed a plot of land to *W. T. Power*, the testator, in fee. The purchase-money was 119*l.* 15*s.*, of which 19*l.* 15*s.* were paid, and the remaining sum of 100*l.* was secured by a promissory note of the testator for that sum, and a deposit of the purchase-deed, by way of equitable mortgage. The testator devised the said plot of land and other real estate to his executors, *H. Power* and *J. Archer*, in trust for his wife for her life, and afterwards for sale, for the benefit of his children; and he died, leaving the 100*l.* and interest thereon unpaid.

The bill was filed by the Plaintiff against the executors and devisees, and the parties beneficially interested in the estate of the testator, for an account of the debt due to the Plaintiff,—a sale of the said plot of land, and payment to the Plaintiff of the proceeds of such sale towards the discharge of his debt; and also for an account of what was due to all other the unsatisfied creditors of the testator,—an account of the personal estate possessed by the executors, and for the application thereof, and a sale of the other real estate, and payment of the proceeds in satisfaction of the Plaintiff and the other unsatisfied creditors.

The parties beneficially entitled under the will of the testator put

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in their answer and disclaimed all right, title, and interest in and to the real and personal estate.

"The decree directed an account to be taken of what [*406] was due to the Plaintiff for principal and interest on his mortgage security, and that the mortgaged premises should be sold, and the purchase-money paid into Court; and directed also the usual amounts of the personal estate of the testator and the application of the same in a due course of administration; and an inquiry of the other real and copyhold estates of the testator. The report stated the accounts of the testator's estate in effect as follows :—Due to the Plaintiff for principal and interest on his mortgage, 127*l.* 7*s.* 1*d.* Sum produced by the sale of the mortgaged premises, 115*l.* 17*s.* 7*d.* Personal estate received by the executors, 524*l.* 13*s.* 4*d.* Paid by the executors (including 27*l.* retained by *J. Archer*, and 129*l.* 19*s.* 8*d.* retained by *H. Power*, for debts due to them respectively from the testator's estate), 579*l.* 15*s.* Balance due to the executors on the account of the personal estate, 53*l.* 1*s.* 8*d.* Due to a creditor who had come in to prove under the decree, 18*l.* 18*s.* 6*d.* Real estate of the testator (exclusive of the said plot of land) sold by the mortgagee thereof under a power of sale, and surplus proceeds of the sale received by the executors, 237*l.* 14*s.* 11*d.*

On the hearing for further directions,

Mr. *Wakefield* and Mr. *Koe*, for the Plaintiff, against his liability to pay the costs of the devisees, said that they were in the same position as assignees of the testator would have been, and cited *Appleby v. Duke* (a), *Hunter v. Pugh* (b), and *Cash v. Belcher* (c). On the right of the Plaintiff to be paid the 115*l.* and his costs, before the retainer of the Defendant, they cited *Loones v. Stotherd* (d), *Chissum v. Dewes* (e), *Brace v. *Duchess of Marlborough* (f), *Kenebel v. Scrafton* (g), *White* [*407]

(a) Ante, p. 303.

(b) Id. p. 307, n.

(c) Id. p. 310.

(d) 1 Sim. & St. 438.

(e) 5 Russ. 29; S. C. 2 Williams on the Law of Executors, 762.

(f) Mos. 60.

(g) 13 Ves. 370.

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v. Bishop of Peterborough (a), *Wontner v. Wright* (b), *Davis v. Battine* (c), *Mason v. Bogg* (d).

Mr. *Kenyon Parker* and Mr. *Armstrong*, for the devisees, in argument for their right to receive their costs, cited *Brown v. Lockhart* (e), *Ex parte Garbutt* (f), *Bennet v. Going* (g), *Swale v. Milner* (h), *Roberts v. Thomas* (i), *Kenebel v. Scrafton* (k).

Mr. *Sharpe*, for the executors, argued that they were entitled to retain their respective debts before any payment should be made for the costs of the suit. *Chissum v. Dewes*, *Bennet v. Going*, *Langton v. Higgs* (l), *Young v. Everest* (m).

Mr. *F. J. Hall*, for the purchaser under the decree.

VICE-CHANCELLOR :—

In this case it appears that the debts which remain unsatisfied, and the costs of the suit, will considerably exceed the amount applicable to their payment; and the principal question, therefore, is with regard to the order in which the several demands upon the assets are to be answered. The Plaintiff, filing his bill to obtain payment of his debt out of the real estate, could not [*408] avoid making the persons interested in the real estate parties to the suit. These parties being Defendants admit the case stated by the bill, but disclaim all interest in the estate, and insist that they are therefore entitled to their costs of the suit, or at least their costs from the time of their disclaimer, upon the suggestion that the bill ought then to have been dismissed against them. I am of opinion that they have no such right. Lord *Redes-*

(a) 3 Swanst. 109; S. C. Jac. 402.

(c) 2 R. & Myl. 76.

(e) 10 Sim. 420.

(g) 1 Moll. 529.

(i) Before the *Vice-Chancellor of England* (not reported), in which it was said that the heir-at-law and administrator were first allowed their costs, where the costs of the suit more than absorbed the whole fund.

(k) *Ubi sub.*

(b) 2 Sim. 543.

(d) 2 Myl. & Cr. 443.

(f) 2 Rose, 178.

(h) 6 Sim. 572.

(l) 5 Sim. 228.

(m) 1 Russ. & Myl. 426.

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dale says, that if the Defendant disclaims, the Court will in general dismiss the bill as against him with costs ; and that is true in this sense, —if his disclaimer shews that he never had any interest, or having had any, that he had parted with it, or disclaimed or offered to disclaim before the bill was filed, he would be entitled to his costs because he was improperly made a party. But if he was interested at the time of filing the bill, and no special circumstance occurs in the case, the mere fact of his saying on the record in effect that he finds his interest worth nothing, and therefore repudiates it, does not prove that he was improperly made a Defendant, and therefore does not bring him within the scope of the general rule to which Lord *Rede-dale* adverts. I had occasion to consider this question in *Fewster v. Turner (a)* and *Cash v. Belcher*, in both of which cases, after inquiry and examination, I was satisfied that a party disclaiming in the sense I have just suggested would not be entitled to his costs. The Plaintiff cannot as a mortgagee be made to pay his mortgagor his costs, and if he was under no obligation to pay the costs, and could not dismiss the Defendant before the hearing without paying them, he has no option but to bring him to the hearing.

The costs of the other parties must be disposed of on other grounds ; and the first question is, whether "any [*409] part of those costs should be paid out of the fund produced by the sale of the estate comprised in the Plaintiff's security, or whether the whole of that fund ought to go into the hands of the Plaintiff as mortgagee. Upon principle, I have no doubt that the Plaintiff has a right to the whole of the mortgaged estate until his entire claim is satisfied. He says that by his contract he is owner of the property to the extent of his lien, and if that is not sufficient, that he ought to be paid out of the general assets. If the proposition is true (and it is true) that he is owner of the fund by his contract, I do not see how the Court can take it from him. In the case of *Brace v. Duchess of Marlborough*, to which I was referred, the parties filed their bill to have their priorities ascertained ; it was not a case of one person insisting upon a priority, but of a number of creditors disputing as to their respective priorities ; and it appears

(a) December 18, 1841. Not reported.

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that the parties, not being obliged to sell, nevertheless did agree that their rights should be adjusted by a sale; and the Court held that the costs of the suit were costs of the administration of the estate. *Kenebel v. Scrafton* was a suit for a like purpose, and the mortgagor and the first mortgagee consented to a sale. *White v. Bishop of Peterborough* and *Wontner v. Wright* were also similar cases, and in all of them the Court expressly says that the first mortgagee is entitled to have the whole of the proceeds applied in paying his debt, if he insist upon his right to foreclose; but that if he chooses a sale, he then introduces a new mode of winding up the estate, not within his contract; and that the costs of the suit are in such a case to be considered as the costs of administering the fund, and ought therefore to be paid in the first instance. The mortgagee is supposed to have a benefit which a foreclosure would not give him,—that of obtaining the proceeds of the sale, and recovering

the rest from the estate,—this he would not otherwise do [*410] without incurring the risk of opening the foreclosure. But, even in these cases, the decisions have not been uniform. In *Greenwood v. Taylor (a)*, Sir *J. Leach* said, that if, after the death of the mortgagor, a creditor comes to have his debt paid, his remedy is to sell his security, and after application of the proceeds, to come for the difference against the estate. Lord *Cottingham* in *Mason v. Bagg* disapproved of that decision, and said that a mortgagee had a right to make the most he could of all his securities. It is laid down in *Cruise's Digest*, and other text books, that where a legal mortgagee has a bond or a covenant the Court will sell the mortgage, and allow the party to prove for the difference. This was the opinion of the Vice-Chancellor in *Brocklehurst v. Jessop (b)*; and the Master of the Rolls in *Allen v. Martin (c)* said, that the mortgagee by consenting to a sale could not be taken to have waived his right to have his debt paid out of the general assets. Without saying that I am at liberty to depart from the principle of *Brace v. Duchess of Marlborough*, (although there is a strong authority for applying a different rule), I am not now called upon to adopt that principle. In the case of a

(a) 1 Russ. & Myl. 185.

(b) 7 Sim. 438.

(c) M. R., Feb. 1841.

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legal mortgage, the argument is this, that the strict right of the mortgagee is foreclosure, but if he chooses to consent to a sale, and takes the benefit of that course of proceeding, he acquires a new right. This does not apply to an equitable lien, for the party has no right but by sale. His contract is that he shall be at liberty to sell the whole estate, and prove for the difference. He does not abandon what his contract gives him, but simply avails himself of it. On these authorities, I am of opinion that by the rule of the Court, the Plaintiff is entitled to the whole of the proceeds of the sale of the mortgaged premises towards satisfaction of his debt.

"The next point is on the question of retainer by the executors. They have clearly a right to retain their debt. [*411] The fact of the money having been brought into Court can make no difference. The debt of the executors being a simple contract debt, the Court will not allow them to keep the fund in their possession; but the Court will nevertheless ultimately place them in the same position as if they had kept it in their hands. If an executor says, "I have paid so much money in satisfaction of debts," he is not charged with it, or, if he is charged with it, he is allowed it in his discharge; but the Court does not give the same effect to the allegation, "I have retained so much for my own debt." The rule is to consider the executor as having a right to retain in a due course of administration; but the Court says until the accounts are taken it cannot see that the right of retainer will exist. When the Court has determined that there is no creditor of a higher degree than the executor, he must be remitted to his original position, to which the right of retainer was incident; and he is entitled to retain his debt in preference to the costs of administering the fund, for to that extent he is in the same situation as a creditor whose debt was paid before the suit, and who cannot therefore be afterwards affected by the costs of administration. *Chisum v. Dewes* decided this very point, and I shall follow that authority. The proceeds of the mortgaged premises being paid to the Plaintiff, the executors will then retain their debt out of the general assets; and the residue will next be subject to the costs. *Bennett v. Going* expresses the rule, as to

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the order in which the costs are to be paid. The executors will first have their costs, for the Court will not take the fund out of their hands until they are paid. The Plaintiff, who stands in the situation of mortgagee, is the party whose costs are then to be provided for. He claims paramount to the owner of the estate, [*412] and the other Defendants claim under the owner; and the latter are therefore entitled to their costs only after satisfaction of the prior charges upon the estate.

And this cause coming on this present day to be heard, &c., for further directions, &c., This Court doth order that the sum of 115*l.* 17*s.* 7*d.*, cash in the bank placed to the credit of this cause, and being the purchase-money arising from the sale of the premises mortgaged to the plaintiff as in the report mentioned, be paid to the Plaintiff *Thomas Tipping* in and towards payment of the sum of 127*l.* 7*s.* 1*d.*, found due to the Plaintiff by the said report, for principal and interest on his mortgage. And this Court doth declare the Defendants, *Henry Power* and *John Archer*, the executors, entitled to retain the sum of 129*l.* 19*s.* 8*d.*, and 27*l.*, respectively mentioned in the said report, as due to the said Defendants respectively from the estate of the testator in the pleadings of this cause named out of the balance received by them on account of the personal estate of the said testator. And it appearing by the said report that the sum paid by the said Defendants, including the sums so retained as aforesaid on account of the said personal estate, exceeds the sum found due from them on balance of the said account by the sum of 55*l.* 1*s.* 8*d.*, It is ordered that the said Defendants be at liberty to retain such balance of 55*l.* 1*s.* 8*d.*, out of the sum of 237*l.* 14*s.* 11*d.*, appearing by the said report to have been paid to the said Defendants from the sale of the other real estate of the said testator. And it is ordered that the said Defendants, *Henry Power* and *John Archer* do pay the sum of 182*l.* 13*s.* 3*d.*, residue of the said 237*l.* 14*s.* 11*d.*, into the bank to the credit of this cause. And this Court doth declare that the Defendants, *Henry Power* and *John Archer*, the executors, are entitled to be paid their costs of this suit, in priority of all other charges on the said testator's real and personal estates, other than that included in the said mortgage to the Plaintiff as aforesaid. And this Court doth declare the Plaintiff's costs of this suit are the next charge thereon. And it is ordered that it be referred to the Master, to whom this cause is referred, to tax the Defendants, the executors, and the Plaintiff respectively their costs of this suit,—the costs of the said Defendants as between solicitor and client. And out of the sum of 182*l.* 1*s.* 3*d.*, when so paid into the bank as aforesaid, it is ordered that the said costs of the said Defendants when taxed, be paid to &c. their solicitor; and out of the residue of the said sum of 182*l.* 13*s.* 3*d.*, the amount to be verified by affidavit, it is ordered that the costs of the Plaintiff be paid to, &c., his solicitor; and, if not sufficient, it is ordered that the said

1842.—Dyson v. Morris.

residue be applied, so far as the same will extend, in payment of the said costs of the Plaintiff; and, if the said Master shall find that there will be any residue of the said sum of 182l. 13s. 3d., after paying the said costs of the said Defendants and Plaintiff, it is *ordered that he do tax the costs of the other Defendants; the whole amount to be certified by the Master. And it is ordered, that the same be paid out of such residue in manner following :—the costs of the Defendants, *Elizabeth Power, W. T. Power, S. Mee and Marianne, his wife, M. Power, A. Pnce, J. Power, E. Power, S. Power, and L. Power, to &c.*, their solicitor and the costs of the other Defendants to &c., their solicitor; but in case the said fund shall not be sufficient, it is ordered that the said costs be paid thereout, as far as the same will extend, as the said Master shall certify. And it is ordered, that the Plaintiff do pay to Mr. *Joseph Price*, the purchaser, his cost, to be taxed by the said Master in case the parties differ; and it is ordered, that the same be added to his own costs herein-before directed to be taxed and paid, and for the purposes aforesaid the said accountant general &c. And this Court doth declare, that, in case there should be any surplus arising from the said real and personal estate of the said testator, the same is to be applied, after satisfying the said costs as hereinbefore directed, in payment of what shall remain due to the Plaintiff and all other the creditors of the said testator according to their priorities. Account to be continued. Further directions and subsequent costs reserved Liberty to apply.

—♦—♦—♦—
DYSON v. MORRIS.

February, 14, 23. March, 9.

The mortgagee of a real estate made a further advance, and took, as security for the same, a further charge upon the mortgaged premises; the covenant of the mortgagor for payment, and an assignment of a policy of assurance on the life of the mortgagor, upon trust to receive the monies to become payable on the policy, and thereout first to pay the expenses of the trust, then to apply the residue towards payment of the mortgage debt, or so much thereof as should remain due, and subject thereto upon trust for the mortgagor. Upon the bill of the mortgagee, praying a sale of the policy, and payment by the mortgagor of so much of the debt as the proceeds of the sale should be insufficient to pay, or in default that the mortgagor might be foreclosed :—

Held, that the mortgagee was entitled only to the usual decree for payment or foreclosure of the real estate, and not to a decree for the sale of the policy; but that he was entitled to retain the policy upon the terms of the trust, notwithstanding the foreclosure of the real estate.

▲ party, named as Defendant to the bill, may, with the consent of the Plaintiff only appear at the hearing of the cause, and be bound by the decree, although such party has not been served with the subpoena to appear, or has not appeared in the suit; but a person, who has not been named as a Defendant to the bill, cannot appear at the hearing without the consent of all the parties to the cause.

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An allegation that A., B., and C. were named executors, and that A. and B. proved the will and are the personal representatives of the testator, may be proved by the production of the probate; and, in the absence of any denial of that fact by the answers, or any averment that C. also proved, C. is not a necessary party to the suit.

Observations on the cases in which Defendants to an original bill should be made Defendants to a supplemental bill.[1]

THE Defendant, *Thomas Brooke Morris*, in 1819, demised [*414] ed the Brockdish Hall estate, in Norfolk, to the *Plaintiff, for the term of 1000 years, by way of mortgage for securing 5000*l.* and interest. In 1823, *Morris* appointed and demised the Shimpling estate in the same county to *Edgar Taylor*, for the residue of a term of 1000 years, in trust for the Plaintiff, by way of mortgage for securing the said 5000*l.* and a further sum of 1000*l.*, making together 6000*l.* and interest. By an indenture, dated the 6th of April, 1826, *Morris* charged the mortgaged estates with a further sum of 3350*l.*, advanced by the Plaintiff, and interest thereon; and, by the same indenture, reciting, that, by a certain instrument or policy of assurance, the Corporation of the Amicable Society were bound to pay to the executors, administrators, or assigns of *Morris* such a proportion or share of the joint stock and fund of the society as should become due upon the death of *Morris*, according to the charters and bye-laws of the society, *Morris* bargained, sold, assigned, transferred, and set over unto the Plaintiff, his executors, administrators, and assigns, all the said instrument or policy of assurance, and all monies which should become payable under or by virtue of the same, and all benefit and advantage thereof, to have, hold, receive, take, and enjoy the said instrument or policy, and monies, unto the Plaintiff, his executors, administrators, and assigns from thenceforth absolutely, with full

[1] One of several co-plaintiffs mortgaged his interest and became insolvent pending the suit. A supplemental bill was filed by the other co-plaintiffs and the mortgagees and provisional assignees alone. It was held that the defendants in the original suit who were accounting parties as yet to have been made parties to the supplemental suit. *Feary v. Stephenson*. 1 Beavan, 43. See comment of Vice Chancellor on this case. *Jones v. Howell*, 2 Hare, 342. 350. See also 10 Sim. 239. n. 1.

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power to demand, recover and receive the said monies, and to enforce, receive, and take the full benefit of the said instrument or policy; but, nevertheless, upon trust, that the Plaintiff should obtain payment and receive the monies which should become payable under or by virtue of the said instrument or policy, when and as the same respectively should become due and payable, and thereout should first retain the expenses of the trust, and then apply the residue towards the payment of the 6000*l.*, and 3350*l.* and interest, or so much thereof as should then remain *un- [*415] paid, and subject thereto, to stand possessed of the said policy of assurance, monies, and premises, upon trust for *Morris*, his executor, administrators, and assigns. *Morris* by the same deed covenanted to pay the 3350*l.* and interest; and declared and appointed that *Edgar Taylor*, in whom the said residue of the term of 1000 years in the Shimpling estate was vested, and *Harry Browne*, in whom the residue of another term of 1000 years in the same premises was vested, should respectively stand possessed of such terms and premises, upon trust for securing the 6000*l.* and 3350*l.* and interest, and subject thereto in trust for *Morris*, his heirs, and assigns.

The whole principal sums, and some interest being unpaid, the Plaintiff, in 1839, filed his bill, stating the said mortgages, and that the said mortgage monies were part of the banking capital of the Plaintiff and his late partners, *Meadows Taylor* and *Harry Browne*: that *Harry Browne* retired from the partnership in 1830, and assigned his interest in the said securities to the Plaintiff and *Meadows Taylor*; and that *Harry Browne* afterwards died, having, by his will, appointed *Henry Browne*, *Edward Browne*, and *Mary Anne Browne*, executors and executrix thereof; and that *Henry Browne* and *Mary Anne Browne* proved the said will and thereby became and were the legal personal representatives of *Harry Browne*. The bill also stated that *Meadows Taylor* had since died, and had, by his will, appointed the Plaintiff and *T. L. Taylor*, *M. Taylor*, and *Elizabeth Taylor*, executors and executrix thereof; and that the will was proved by the Plaintiff and *T. L. Taylor*, who thereby became and were the legal personal representatives of *Meadows*

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Taylor. The bill stated, that upon the death of *Meadows Taylor*, the Plaintiff alone became interested in the said mortgage [*416] securities ; and it prayed an account and payment by the Defendant *Morris* of what was due to the Plaintiff in respect thereof, or in default of such payment, that the policy of assurance might be sold, and the money arising by the sale applied in satisfaction of the Plaintiff's debt ; and, in case it should be insufficient for that purpose, then that the Defendant *Morris* might pay what should remain due to the Plaintiff, or in default thereof, be foreclosed. Or, if the Court should be of opinion that the said mortgaged premises ought to be sold to raise and pay what should be found due to the Plaintiff, then that the same might be sold accordingly. *Henry Browne*, *Mary Anne Browne*, and *T. L. Taylor* were also Defendants to the original bill ; and the personal representatives of *Edgar Taylor*, who was dead, were alone made Defendants by supplemental bill.

No material question was raised by the defence, except as to the amount of principal monies and interest, for which the mortgages ought to stand as security. *T. L. Taylor* admitted that the whole mortgage monies belonged to the Plaintiff, and, as executor of *Meadows Taylor*, he disclaimed. At the hearing,—

Mr. Sutton Sharpe and *Mr. Rolt*, for the Plaintiff, asked for the decree according to the first alternative of the prayer of the bill.

Mr. Temple and *Mr. Sidebottom*, for the Defendant, *Morris*, insisted, first, that the bill was defective for want of parties.—1. The representatives of *Edgar Taylor*, in whom the residue of the term was vested, were not parties to the original bill ; and though it was said that they were made parties to the suit, being brought before the Court by a supplemental bill ; yet, inasmuch as the [*417] Defendants to the original bill were not parties to the supplemental bill, they could have no knowledge of that suit, or of its object ; and, therefore, the defect of parties, so far as the original Defendants were concerned, was not removed by the supplemental suit. 2. *Edward Browne*, one of the executors of *Harry Browne*, was not a party, and there was no statement that

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Edward did not prove the will, or that the other executors alone proved it. 3. *M. Taylor* and *Elizabeth Taylor*, two of the executors of *Meadows Taylor*, were not parties; and the bill, in their cases also, omitted to state that they did not prove the will, or that the will was proved by the other executors alone. Secondly, the mortgaged estates, and the policy of assurance, are contemporaneous securities. The Plaintiff is not entitled to a decree for foreclosing the estates, and still to retain the policy. Nor is a sale of the policy within the trusts upon which it was assigned: that trust is limited to receiving "the monies which shall become payable under and by virtue of the policy;" it is a trust necessarily to be executed when these monies shall be actually payable, and there is nothing which enables the Plaintiff to anticipate the benefit he is to derive under it by a sale of the policy: the Plaintiff might sell the interest, if any, which he himself takes under the trust, without affecting the interest of *Morris* in the policy; but for a sale to this extent he does not need the aid of the Court.

Mr. *Sharpe*, in reply.

As to parties. 1. The representatives of *Edgar Taylor* are properly before the Court for all the purposes of the suit; for what are the purposes of the suit?—only that the Defendant, *Morris*, might pay the debt or be foreclosed; and, if he should pay, then that the Court might give him a complete reconveyance of the mortgaged premises: and this the frame of the "suit" [418] enables the Court to do. But, omitting the supplemental bill, the absence of these parties, who are only trustees to convey as the Plaintiff shall direct, will be supplied by their appearance at the hearing, with the consent of the Plaintiff, and their submission to be bound by the decree. 2. 3. The averment that certain parties, who are before the Court, were appointed executors, and proved the will, and are the legal personal representatives of a deceased person, is sufficient *prima facie*, at least, to shew that the estate of that person is properly represented in the suit; and the additional averment, that certain persons were named executors, does not of

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necessity raise the inference that those persons are the representatives, for other facts must combine to constitute that character.

- As to the relief to be given in respect of the policy of assurance;—the deed of 1826 must be taken as an instrument, the entire object of the making of which was to secure payment to the Plaintiff of the mortgage money. The trust, as well as the whole mortgage deeds, must be construed with reference to that intent; and to construe these instruments, as postponing the time when the Plaintiff may recover payment of the mortgage money, until the death of the mortgagor; would be unreasonable: this, however, would be the effect of the construction which is contended for. Nor would it be less unreasonable to hold that the Plaintiff may not enforce one of his securities without giving up the other, which is collateral.

The following cases were cited on the question of parties:—*Capel v. Butler* (a), *Bozon v. Bolland* (b), *White v. Hall* (c), *Greenwood v. Atkinson* (d), *Attorney-General v. Pearson* (e), *Munch v. Cockerell* (f), *Feary v. Stephenson* (g), *Semple v. Price* (h). On the other points, *Perry v. Barker* (i), *Parker v. Housefield* (k), *Mellor v. Wood* (l), *Thorpe v. Gartside* (m), *Seton on Decrees*, p. 180.

THE VICE-CHANCELLOR:—

Two objections have been taken at bar to the state of the pleadings in this cause. First, it was said that the defect in the original bill, in omitting *Edgar Taylor*, or his representatives, as parties, was not cured by the supplemental bill against such representatives only; and that the mortgagor, at least, was a necessary party to that supplemental bill, in order to render the frame of the suit complete.

It was suggested in argument, that even admitting there was on

(a) 2 Sim. & St. 457.

(d) 5 Sim. 419.

(g) 1 Beav. 42.

(i) 8 Ves. 527; S. C. 13. Ves. 198.

(l) 1 Keen, 16.

(b) 1 Russ. & Myl. 69.

(e) 7 Sim. 290.

(h) 10 Sim. 238.

(m) 2 Y. & Coll. 730.

(c) Id. 322

(f) 8 Sim. 219.

(k) 2 Myl. & K. 419.

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the pleadings a defect, occasioned by the absence of the representatives of *Edgar Taylor*; that defect was supplied by their appearance and consent to be bound by the decree; and that then the objection taken to the frame of the supplemental bill, if valid, would resolve itself into a question of costs. Upon referring to the authorities, I doubt whether that course would be regular in this case. The practice, as I collect it from the decided cases, is,*that if a person is named as a party to a bill, and has not appeared, or not even been served with a subpoena to appear, the Court will, with the Plaintiff's consent, permit such party to appear at the hearing, *and become a party to the decree by submitting [*420] to be bound by it. *Capel v. Butler (a)*, *Attorney-General v. Person (b)*. *Banister v. Way (c)*. But where the party, who appears at the hearing and offers to be bound by the decree, is not named as a party to the bill, the Court will not, unless with the consent of all the parties to the cause, permit him to become a party to the decree. *Bozon v. Bollond (d)*, *Attorney-General v. Pearson*. The report of the case of *White v. Hall (e)* does not shew what the state of the record was, but that case is clearly distinguishable from that which I am now considering. And I am satisfied that the cases which I have cited correctly represent the practice of the Court, although I am informed that the practice has been relaxed in some late instances.

The question then is, whether the mortgagor ought to have been made a party to the supplemental bill. I do not mean to decide any general proposition with respect to the cases which require that the defendants to an original bill should be parties to a supplemental bill. If compelled, which I am not, to express an opinion upon that point, I should rather incline to say that the cases in which the parties to the original bill were necessary parties to a supplemental bill were those in which the interests of the original defendants required that such new parties should be before the Court, and that the cases in which the parties to the original bill were not necessary

(a) 2 Sim. & Stu. 457.

(b) 7 Sim. 302.

(c) 2 Dick. 686.

(d) 1 Russ. & Myl. 69.

(e) Id. 332.

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parties to the supplemental bill were those in which the new parties are brought before the Court in respect of the interest of the Plaintiff, or of the new defendants. It is sufficient, however, [*421] in this case, to say that the decision in *Greenwood* *v.

Atkinson (a), which was come to after argument, was followed in the *Attorney-General v. Pearson*, in *Semple v. Price* (b), and was not disapproved of by Lord *Langdale* in *Feary v. Stephenson* (c). Upon these cases, I observe only that the practice which they establish cannot possibly work injustice in this case. The original and supplemental causes are heard together. The mortgagor has a right to insist that the decree shall provide for the reconveyance of the estate upon payment of the mortgage money, and it is only for the purpose of such reconveyance, that the executors of *Edgar Taylor* are necessary parties to the cause. If the Court cannot by means of the original or supplemental bill make such a decree as the mortgagor is entitled to, the suit must fail; but if the original and supplemental bill do enable the Court to make the decree to which the mortgagor has a right, it is obvious, that he has no reason to complain of the form of the record. In this case, the executors of *Edgar Taylor* are brought before the Court, and are willing to do all which the exigencies of the decree may require, and the ground of objection, except as a matter of form, ceases to exist.

The second objection was, that it did not appear that the estates of *Henry Brown* and *Meadows Taylor* were truly represented upon the record. The bill alleges that they appointed certain persons as their respective executors, and that some of those persons, who alone are parties, proved the wills under which they were respectively appointed, and that they are the legal personal representatives of their testators: but the bill does not allege that the other persons who were named executors did not prove. I have no [*422] reason to alter the *opinion which I before expressed, as to this point. If the bill had alleged in terms that the persons who in each case are said to have proved the will, had alone proved it, the production of the probate in each case would have sup-

(a) 5 Sim. 419.

(b) 10 Sim. 238.

(c) 1 Beav. 42.

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ported the allegation. I think the allegation, as it stands, will admit the same proof, and that such proof is sufficient, especially where the truth of the case might so easily be ascertained, and there is no suggestion that the facts are otherwise than the bill suggests.

I come, therefore, to the substantial question in the cause,—what decree is to be made in respect of the policy of assurance?—a question upon which I have felt the greatest difficulty in forming an opinion, and respecting which, therefore, I think it right fully to explain the grounds of my judgment.

Looking at the real estate alone, there is no question as to the decree I should make, if that were the Plaintiff's only security. The decree would be the ordinary decree in a foreclosure suit.

Again, if the subject of that suit were stock, or personal chattels alone, the decree to be made would, I conceive, be equally a matter of course. There can, I apprehend, be no doubt that in a case of a mortgage of stock (*a*), and in the case of a mortgage of personal chattels, (*Kemp v. Westbrook* (*b*)), the remedy of the mortgagee would be by sale. And I apprehend, a right to the same kind of relief would exist in equity in the case of a simple assignment of a policy of assurance (*c*).

*Again, in the case of a mortgagee, whose security was composed both of land and stock, or personal chattels, [423] or a policy simply assigned as a security, I should probably experience little difficulty as to the decree to which the mortgagee would be entitled. In the case of securities so constituted, the course usually recommended out of Court to a mortgagee is, first to realize his collateral securities, and then to proceed to foreclose the mortgage for so much of his debt as the collateral securities may not satisfy. A decree in that form would therefore follow the course usually pursued out of Court, and it is the form which the justice of the

(*a*), Coote on Mortgages, pp. 362, 607, 2nd edit. Powell on Mortgages, edition by Coventry, Vol. 2, p. 1066.

(*b*) Belt's Sup. to Ves. sen. 141.

(*c*) *Duncan v. Chamberlain*, 11 Sim. 122, V. C. 30th April; 54th July, 1841, not reported, on the form of the decree.

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case manifestly requires ; for it is only by first realizing his collateral securities, and afterwards proceeding to foreclose the mortgage, that a mortgagee can get a valid decree of foreclosure without foregoing the benefit of the collateral securities, which he cannot, as a matter of course, be required to do.

The difficulty I have experienced has been in applying the preceding principles to the particular case before me. And this difficulty arises from the particular form of the instrument of assignment in this case. By that instrument, the policy itself, and the monies to be received under it, are assigned to the Plaintiff absolutely in the largest possible terms ; but only upon trust to receive the monies to become due and payable under the policy. No power of sale is contained in the assignment ; and the mortgagor contends that, however large may be the terms of the assignment of the policy, the trust declared upon it is the true measure of the mortgagee's interest in it, in this Court, in which alone the assignment is operative. The mortgagor contends, in effect, that the mortgagee has a right to make the policy available in the manner and form pointed out by the

trust and not otherwise, and that by the terms of the
 [424] *trust, his interest is limited to a right to receive the monies after the death of the assured, excluding a right to have the policy sold. And if the assignment of the policy stood alone, it would perhaps be difficult to deny the force of this argument. But in determining the effect to be given to that assignment, not standing alone, but in conjunction with a mortgage of land which carried with it a certain well-defined right, namely, a right of foreclosure, the first observation which arises is this,—that unless the policy is now to be sold, it is impossible for the plaintiff to obtain a valid decree of foreclosure, without giving up the benefit of the policy. If the policy is not now to be sold, the Plaintiff must either give up his right to a valid decree of foreclosure, or give up the policy. One test, therefore, by which the rights of the parties may safely be tried is, by ascertaining whether, according to the true construction of the deed of April, 1826, it was not intended that the Plaintiff should have a right immediately or at any time to demand

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and enforce payment of his debt, without abandoning the securities, or any part of the securities he held for that debt at the time the policy was assigned. Now there certainly are strong grounds for contending, that the deed of April, 1826, with the exception of the trust as to the policy, shews that this was the intention of the parties. At the time of executing that deed, the mortgagee had an undoubted right to foreclose his existing mortgages. The deed recites an agreement by the plaintiff to make a further advance of 3350*l.* upon the terms of having the same secured, first, by a further charge upon the mortgaged lands, and, secondly, by an assignment of the policy, and of the monies which should become payable. The deed then creates the further charge upon the lands,—declares that the lands shall not be redeemable without payment of the whole mortgage debt, and assigns the policy; and the mortgagor covenants to pay the money then advanced. There is [425] much difficulty in spelling out of this transaction an intention on the part of the mortgagee to forego his right of foreclosure during the whole life of the mortgagor (for to that length the argument must go), or otherwise of giving up the benefit of the policy, or of having (as it may be) the foreclosure opened, if he should assert his right to the benefit of the policy after the death of the mortgagor. The covenant to repay the advance of 3350*l.*, made at the time of the assignment, is evidence that the parties intended that the mortgagee should be entitled to enforce payment of his debt, at least at the time expressed in that covenant; and the proviso, that the lands shall not be redeemed nor redeemable at law or in equity until payment of the entire mortgage debt of 9350*l.*, is contemporaneous evidence that the mortgagee was to retain his existing mortgage security unimpaired by the transaction of April, 1826. In the absence of express words to shew it, I have great difficulty in believing that it could have been intended that any part of the security, which the Plaintiff had at the time of executing the deed of April, 1826, should be forfeited or impaired by the act of enforcing payment of his debt during the life of the mortgagor. Nor am I prepared fully to admit, that the trusts declared concerning the policy are such as, necessarily and incontrovertibly, to countervail the obvious effect of the deed in all

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other respects. If the declaration of trust had been omitted, the mortgagee would, in my view of the case, have had a right at his own election, in default of payment of the mortgage debt, to have had the policy sold in the lifetime of the assured, or to have received the money payable by virtue of the policy after his death. The trust declared is confined in terms to the latter of these rights; and, as I have already said, if the deed of the 6th of April, 1826, had

related only to the policy, "I am far from saying, that [426] conclusive weight would not be due to the argument, which requires me to hold that the expression of that

trust excludes the right to sell the policy. But such an implication, when its effect upon the Plaintiff's right of foreclosure is considered, is not by any means necessary or conclusive. I may observe, also, although I do not lay any stress upon the circumstance, that, in the concluding part of the deed in which the mortgagor appoints a term of years to secure the advance of the 3350*l.*, the trusts are in the same form as those declared of the policy; they are, "in the first place, for better and more effectually securing," to the Plaintiff, "as well the payment of the said sum of 3350*l.* and interest as of the said sum of 6000*l.*, and subject thereto upon trust" for the mortgagor, "his heirs and assigns." But no one could seriously contend, that this ultimate declaration of trust, in favour of the mortgagee, would oblige the mortgagee to retain the lands comprised in the term in specie, if the nature of his security in other respects were such as to entitle him to a sale.

In this conflict of evidence, which the deed of April, 1826, itself raises as to the real intention of the parties to it, I have thought it safest, upon the whole, to ascertain whether, construing the deed according to the letter, the mortgagee could, in any probable state of circumstances, have had the full benefit of his securities in the specific manner most beneficial to him. Now, if the mortgagor had died at any time before the bill was filed, or even before the decree, the mortgagee would have had the full benefit of his securities in the specific manner most beneficial to him. He might, in that case, have applied the proceeds of the policy in reduction of his debt, and taken a foreclosure for so much as the proceeds of the policy

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would not satisfy. Finding, then *that the deed, construed [427] according to its letter, might, in one state of circumstances, have a sensible operation, I have thought it safer, though with much hesitation, to abide by the letter of the deed than to act upon a conviction to which that letter is certainly, in some decree, opposed,—that the deed of April, 1826, has inadvertently been so framed as to defeat the real intention of the parties to it.

It was then said, for the mortgagor, that the mortgagee, taking a decree of foreclosure, must give up the policy to the mortgagor. This claim I have no hesitation in rejecting. A mortgagee, foreclosing a mortgage, is never called upon to give up his bond, or release the mortgagor from his covenants, or give up any collateral securities he may hold. It would manifestly be unjust that he should be compelled to do so. The estate, which is his at law, may not be worth half the money charged upon it; and the mortgagor, by keeping faith with the mortgagee in paying the mortgage debt, may ward off the foreclosure. Nor can any injury be done to the mortgagor by the mortgagee retaining his collateral securities, because, if the estate should, in fact, be worth more than the mortgage money, a court of equity would open the foreclosure, if the collateral securities should be put in force, and the justice of the case should require it: *Perry v. Barker (a)*.

I think the Plaintiff, in this case, must take the usual decree of foreclosure, retaining the policy for what it may hereafter be made available.

As the executors of *Harry Browne* are before the Court in the character of termors, and, in that character, *are [*428] necessary parties to the suit, I can make no special order as to their costs. I think the Plaintiff must pay the costs of the executor of *Meadows Taylor*. Looking at the statements in the bill, I cannot understand why he was originally made a party to the suit, or why the bill should not be dismissed against him: he has, moreover, disclaimed upon the record. The decree must be made in both causes; but the Plaintiff must pay the costs of the supplemental suit up to, and including the filing of, the supplemental

(a) 8 Ves. 527; S. C. 13 Ves. 198.

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bill. The costs of the answer to that bill, and the costs of the Defendants to it, of appearing at the hearing, would equally have been occasioned if the representatives of *Edgar Taylor* had been named as parties to the original bill. The costs of the supplemental suit, other than the costs of the bill, should follow the usual course.

GREEN v. HARVEY.

1842: May 4, 9.

The testator bequeathed a leasehold house and premises, with the furniture and plate to his son, and added, "and should he die without heir or will, the profits of the said house to be equally divided between all my grandchildren, by the consent of his mother:"—*Held*, that the son took an absolute interest in the house.

THIS suit was instituted to determine the construction of the following clause in the will of *R. Green*, made in 1819:—

"The house, No. 4, in the Royal Crescent, with the house in Crescent-street, with the coach-houses and stables belonging to No. 4, I give and bequeath to my son *Richard*, with all the household furniture, plate, &c., thereunto belonging; should he die without heir or will, the profits of the said No. 4 to be equally divided between all my grandchildren by the consent of his mother."

The premises comprised in this gift were leasehold. [*429] *Richard*, the son, survived the testator, and died unmarried, and intestate; and his personal representatives claimed to be absolutely entitled to the property. The grandchildren of the testator claimed the same property under the bequest over in the events which had happened.

Mr. *Boteler* and Mr. *Hare*, for the personal representatives of *Richard*, the son.

It is an established principle, that a gift over, in case of the death of the devisee or legatee without heir, would create an estate tail in realty, and confers an absolute interest in personal estate on

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the first legatee. The second contingency introduced in this case, of the death of the first legatee without will, does not interfere with the operation of the principle which, if there had been no such contingency, would have given the absolute interest to *Richard*, the son: *Robinson v. Dustgate* (a); *Maskelyne v. Maskelyne* (b); *Grey v. Montagu* (c); *Attorney-General v. Hall* (d); *Ross v. Ross* (e); *Cuthbert v. Purrier* (f); *Bradley v. Peixoto* (g); *Simmons v. Simmons* (h).

Mr. *James Russell* and Mr. *Green*, for grandchildren of the testator living at his death.

The cases cited, relating entirely to the form of expression which creates an absolute power of disposition in the legatee, and to which a subsequent gift over is necessarily repugnant, have no application to the present case, which depends on a different question. This bequest cannot be taken as pointing to an indefinite failure of issue; for that construction is repelled not only [*430] by the circumstance, that the existence of the heir or of the will must be contemporaneously ascertained, but by the reference to the consent of the mother, thus intimating an intention to confine the period of distribution amongst the grandchildren within the duration of the mother's life. The contingencies on which the gift depends are, if the son die, either without heir or will, in the disjunctive. He has died intestate. What principle of law exists which can prevent the bequest over from taking effect? *Target v. Gaunt* (i); *Pinbury v. Elkin* (k); *Keily v. Fowler* (l); *Devisme v. Mello* (m); *Nannock v. Horton* (n); *Walker v. Shore* (o); *Gawler v. Cadby* (p): they also mentioned *Sibley v. Perry* (q); and *Campbell v. Harding* (r).

[The claim of the grandchildren living at the death of the testa-

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| (a) 2 Vern. 181. | (b) Amb. 750. | (c) 2 Eden, 205; S. C. affirmed, 3 Bro. P. C. 314, Toml. ed. |
| (e) Id. 154. | (f) Jac. 415. | (g) 3 Ves. 324. |
| (h) 8 Sim. 22. | (i) 1 P. Wms. 422. | (k) Id. 563. |
| (l) 3 Bro. P. C. 299, Toml. ed. | | (m) 1 Bro. C. C. 537. |
| (n) 7 Ves. 390. | (o) 15 Ves. 122, 125. | (p) Jac. 846. |
| (q) 7 Ves. 522. | (r) 2 Russ. & Myl. 390. | |

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tor was admitted in argument not to be distinguishable from that of the other grandchildren born before the death of *Richard*, the son.]

Mr. *Wray*, Mr. *Sandys*, and Mr. *Haddan*, for grandchildren born after the death of the testator, and before the death of *Richard*, the son.

Mr. *Crawford*, for the surviving personal representative of the testator.

THE VICE-CHANCELLOR, after stating the facts, said :—

The Plaintiff who is the personal representative of [*431] **Richard*, the legatee, contends that *Richard* took an absolute interest in the property, and I am of opinion that this claim is well founded.

The first question I shall consider is, whether the word “or” is to be read in its proper sense, or whether “and” is to be substituted for it. The testator by referring to the heir of his son (which in this case must of necessity mean issue) shews that the issue of his son are the objects of his care, and this consideration alone, according to the better authorities, seems generally to have determined courts of justice in substituting “and” for “or” in the construction of a will (a). [1] The circumstance, that “or” is in common parlance, frequently used for “and” has apparently aided the courts in this departure from the very sound rule of construction which requires courts of justice to adhere to the proper sense of the words of a testator, except where, upon the will itself, or in the circumstances to which the will refers, there is evidence that the testator did not so use them. In this case, the remarkable inaccuracy of expression throughout the will shews that a critical observance of the words of the testator cannot safely be depended upon; and I could not avoid

(a) 1 Jarman on Wills, 379.

[1] See *Hunt v. Hunt*, 11 Metcalf R. 88. *Denn d. Wilkins*, 9 East R. 366. *Fairfield d. Hawkesworth v. Morgan*, 2 N. R. 38. *Maberley v. Strode*, 3 Ves. 420. *Stubbs v. Sargon*, 2 Keen, 255. *O'Brien v. Heaney*, 2 Edw. Ch. R. 242. *Mills v. Dyer*, 5 Sim. 435.

1842.—Brown v. Hayward.

construing the word “or” as meaning “and,” without ascribing to him the most capricious intention.

The next question to be considered is the effect of the limitation over, in the event of *Richard* dying without a will. The gift to *Richard* is absolute in the first instance; and the general rule of law is, that an absolute interest is not to be taken away by a gift over, unless that gift over may itself take effect. Now, it has been repeatedly decided, that where a legacy is given [*432] “absolutely, and a gift over is superadded in the event of the legatee dying without having disposed of his legacy, the gift over is void, and the legacy is absolute; *Ross v. Ross* (a); *Bradley v. Peizoto* (b).

The question, then, is, whether there is any difference between a gift over in the event of the legatee not disposing of the legacy, and a gift over in the event of his not disposing of it by will. I think no such distinction can be maintained. The will of *Richard* is not to be the exercise of a power, but an incident to property which is sufficient to place the whole at the absolute disposal of the legatee. The cases cited on behalf of the personal representatives of *Richard* shew that where such absolute power is given, the property is absolute. I read this part of the will, therefore, as if it had stood—“If he shall have no heir, and shall not have disposed of the property.”

I must declare the Plaintiff, as the personal representative of *Richard*, entitled to the leasehold premises in question: the costs to be paid out of the estate.

BROWN v. HAYWARD.

1842: July 29, 30.

The admission of a will, in the separate answer of a married woman, who is the heir-at-law of the testator, is not sufficient evidence to enable the court to declare the will established.

A BILL for the administration of an estate according to the trusts of

(a) 1 Jac. & W. 154.

(b) 3 Ves. 324.

 1842.—Brown v. Hayward.

a will comprehending real and personal property. There were four co-heiresses of the testator. Two of them were Plaintiffs, and two were Defendants. Of the latter, one was adult and unmarried, and the other was a married woman, living separately from her husband. The married woman put in a separate answer under [*438] the usual order for that purpose. Both the co-heiresses who were Defendants admitted the will. The husband of the married Defendant disclaimed. No evidence was given to prove the will.

Mr. *Baily* and Mr. *Bevir*, for the Plaintiffs, said that there was a precedent which authorized the Court to establish a will upon the admission of a married woman in her separate answer; in the case of *Codrington v. Earl of Shelburne* (a); and in *Le Neve v. Le Neve* (b), Lord *Hardwicke* acted upon a like admission. 1 *Dan. Chan. Pr.* p. 213. They expressed a doubt, however, of the authorities upon the point.

THE VICE-CHANCELLOR, after having caused the Registrar's book to be referred to, said, that in the case of *Codrington v. Earl of Shelburne*, the order in the Registrar's book was in the words of the report in *Dickens*. He should be unwilling to act in opposition to a plain decision of Lord *Bathurst*; but he had ascertained that the other judges of the Court concurred with him in opinion that the admission of a married woman, whether made in a joint answer with her husband, or in a separate answer, did not enable the Court to establish a will against her, or bind her inheritance (c).

Liberty was given to exhibit interrogatories for the purpose of proving the will.

(a) 2 *Dick.* 475.

(b) 3 *Adk.* 648.

(c) The Registrar stated that the Master of the Rolls had recently caused the case reported in *Dickens* to be inquired into, and had been satisfied that it was not an authority for the proposition which it purported to establish. The answer in *Codrington v. Earl of Shelburne* was said to relate to the separate property of the lady.

1842.—*Browell v. Reed.*

**BROWELL v. REED.*

[*434]

1842: February 24.

Where there are several trustees, the disclaimer of one of them is not alone a sufficient ground for the appointment of a receiver, without the consent of those who remain.

THE testator devised and bequeathed his real and personal estate to four trustees upon the trusts of his will, with power to raise money for the purposes thereof by sale or mortgage. One of the trustees died in the lifetime of the testator, and, after his death, one of the surviving trustees disclaimed. The suit was by the infant grandchildren of the testator, and others interested in the estate, for administration. The acting trustees contracted to sell part of the real estate of the testator; and by the answer, which was filed six months after the sale, it appeared that the purchaser was in possession, but the purchase-money was not accounted for. The Plaintiffs moved for a receiver.

Mr. *Sharpe* and Mr. *Heathfield*, for the motion, relied, first, on the disclaimer of one of the surviving trustees: *Beaumont v. Beaumont*, cited by Sir *S. Romilly*, in *Brodie v. Barry* (a); and, secondly, on the fact, that the Defendants had not accounted for the purchase-money of the real estate.

Mr. *Osborne*, for the trustees, and the mother of the infant Plaintiffs, entitled on the contingency of their death under twenty-one, opposed the motion.

THE VICE-CHANCELLOR refused the motion.—His Honor said, that, upon examination of the case of **Beau-* [*435]
mont v. Beaumont, it appeared that there one trustee disclaimed, and all the other parties desiring it, and the other trustee consenting, the Court ordered that there should be a receiver. The disclaimer of one of several trustees did not, in law, affect the

(a) 3 Mer. 695.

 1842.—Crawford v. Fisher.

estate of the others, but had the effect of vesting it in them exclusively: *Small v. Marwood*, per *Bayley, J.* (a); *Townson v. Tickell* (b); *Adams v. Taunton*, per. *Sir J. Leach* (c). The testator must be presumed to know what the legal consequences of the death or disclaimer of some of the devisees would be. In *Middleton v. Dodswell* (d), the Court appointed a receiver, but it was on the misconduct of one trustee, and by the consent of the other two. In *Tidd v. Lister* (e), there had been several trustees one of whom was dead, and one abroad: the business of the trust fell almost exclusively on one trustee; and, upon the consent of the acting trustee, *Sir John Leach* considered that he was authorized to appoint a receiver. It had never been the practice to appoint a receiver solely because one of several trustees had disclaimed, or was inactive, or had gone abroad. The Court would not, of necessity, infer that there was misconduct in the trustees in respect of the other ground upon which the motion was made. If there was such misconduct, it might be the subject of a special application, to which the Court would be bound, in the other circumstances of the case, to give its serious attention.

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*CRAWFORD v. FISHER.

1842: March 2. February 23, 24, 25.

A supplemental bill of interpleader held to be regular, although filed in respect of a sum amounting to less than 10*l*.

The Plaintiff, in interpleader, must bear the costs of any proceedings which he may take in the suit that are productive of needless expense; and, therefore, where the Plaintiff filed affidavits, verifying the statements of the bill, and entered into evidence in the cause, and obtained a second injunction *ex parte* to restrain proceedings at law, when no such proceedings were threatened, he was ordered to pay the costs thereby incurred.

Observations on the circumstances which render cases properly, or not properly, the subjects of interpleader.

Semble, a suit of interpleader ought to be so constituted at the hearing, that the de-

(a) 9 B. & C. 300, 308.

(c) 5 Madd. 488.

(e) 5 Madd. 483.

(b) 3 B. & A. 31.

(d) 13 Ves. 368.

1842.—*Crawford v. Fisher.*

crees may embrace the whole property, which is the subject of the claims of the Defendants, whereupon the Court is required to adjudicate.

AN original and supplemental suit of interpleader.—The Plaintiffs were East India merchants in London, having correspondents at Calcutta and Bombay, and the subject of the original suit was a sum of 496*l.* 19*s.* 6*d.*, the balance of the proceeds of certain goods, which had, in the course of trade, been consigned to the Calcutta and Bombay houses, and in respect of which the Plaintiffs had made advances upon the security of the proceeds to be remitted to them. The consignments of the goods were made in the years 1835 and 1836, by the manufacturers, *Bazeley* and *Hansbrow*, through the agency of *Coupland* and *Duncan*, of Liverpool, commission agents. After the consignments had been made, *Coupland* and *Duncan* became bankrupts; and their assignees, the Defendants, *Miller*, *Lyon*, and *Thomas*, in January, 1838, served the Plaintiffs with a notice claiming the balance of the proceeds of the consignments, on the ground of an alleged lien thereon, for advances to a greater amount made by *Coupland* and *Duncan* to *Bazeley* and *Hansbrow*. *Bazeley* afterwards became bankrupt, and the Defendants, *Fisher* and *Wadsworth*, his assignees, in September, 1838, gave notice of their claim to the same proceeds to the Plaintiffs; and, in July, 1839, the same assignees of *Bazeley*, together with *Hansbrow*, commenced an action against the Plaintiffs to recover the amount. Proceedings to recover the same sum were also commenced or threatened by the assignees of *Coupland* and *Duncan*.

*In July, 1839, the original bill was filed against all [*437] the Defendants; and, in addition to the usual affidavit denying collusion, the facts stated in the bill were verified by affidavit: the sum of 496*l.* 19*s.* 6*d.* was brought into Court, and the injunction, *ex parte*, restraining the proceedings in the action, was obtained.

After the institution of the original suit, the Plaintiffs received a further sum of 6*l.* 16*s.* 6*d.* for average on a policy in respect of part of the goods, the balance of the proceeds of which consisted of the sum in Court. A claim was also then made, by some of the Defendants, for interest on the principal sum of 496*l.* 19*s.* 6*d.*,

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whilst in the hands of the Plaintiffs. Up to the 13th of December, 1839, the interest thus claimed on the sum of 49*l.* 19*s.* 6*d.* amounted to 65*l.* 16*s.* 6*d.*; and the interest on the sum of 6*l.* 16*s.* 6*d.* amounted to 3*s.* 6*d.*

On the 13th of December, 1839, the Plaintiffs filed their supplemental bill of interpleader against the same Defendants, stating the receipt of the 6*l.* 16*s.* 6*d.*, and the claim made for interest since the original bill was filed, (as mentioned in the last paragraph), and praying that the Defendants might interplead, and be restrained from proceeding for the recovery of such sums. The 6*l.* 16*s.* 6*d.*, and the two sums of 65*l.* 16*s.* 6*d.* and 3*s.* 6*d.*, were brought into Court, and a second injunction applicable to such sums obtained ex parte.

The assignees of *Coupland* and *Duncan*, by their answer, alleged, that they had made advances to *Bazeley*, after the shipment of the goods, and that, by a special contract between him and them, they were entitled to a lien on the proceeds of the goods to the amount of such advances. The assignees of *Bazeley*, [*438] and the Defendant *Hansbrow*, by their answer, claimed to be exclusively entitled to the sums in question; and insisted, that no part thereof was a proper subject of interpleader, and that both bills ought to be dismissed with costs. The Plaintiffs went into evidence to prove the state of the account, and the actual amount of the balance of the proceeds which they had received. No motion was made to dissolve the injunctions, which, therefore, continued until the hearing. At the hearing,

Mr. *Girdlestone* and Mr. *Baily*, for the Plaintiffs, in support of the argument, that the case was a proper subject of a suit of interpleader, cited *Mason v. Hamilton* (a); *Smith v. Hammond* (b); *Crawshay v. Thornton* (c); *Suart v. Welch* (d); *Jew v. Wood* (e); *Wright v. Ward* (g). And they argued, that the Plaintiffs had no other course of proceeding open to them, by which they could obtain payment of their costs, than that of bringing the cause to a hearing.

(a) 5 Sim. 19.

(b) 6 Sim. 10.

(c) 2 Myl. & Cr. 1.

(d) 4 Myl. & Cr. 305.

(e) 1 Cr. & Ph. 185.

(g) 4 Russ. 215.

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Mr. *Sharpe* and Mr. *Rolt*, for the Defendants, the assignees of *Coupland* and *Duncan*, insisted, first, that the supplemental bill ought to be dismissed. It related to matters which ought to have been introduced either originally or by amendment in the original bill, and did not properly form the subject of a supplemental bill. The interest on the sum, which was the subject of the original suit up to that time when that sum was paid into Court, plainly ought to have been also paid into Court. The Plaintiffs were bound to know what was due from them; and the circumstance, that no claim for interest had then been made, was wholly unimportant. The small sum of money subsequently received was a *part [*439] of the property in dispute, and, at the utmost, might have been the subject of amendment. The latter sum was too small in amount to be made the subject of a suit in equity, either of interpleader or otherwise: *Smith v. Target* (a). The Defendants had, in fact, made no claim for this sum, and would not have brought any action in respect of it. Secondly, if the supplemental bill were not strictly irregular, it was an unnecessarily expensive mode of proceeding, which the Court would not sanction by allowing it in costs. Even if the Plaintiffs were held to be entitled to the general costs of the two suits, yet the affidavits verifying the statements of the original bill were wholly unnecessary and irregular: *Walbanke v. Sparks* (b); and the second injunction, to restrain an action never contemplated, was also unnecessary, and the Plaintiffs should bear the costs of both of these proceedings.

Mr. *James Russell* and Mr. *Geldart*, for the Defendants, the assignees of *Bazeley*, in addition to the points insisted upon by their co-Defendants, contended, that there was not, in fact, any such conflict of title as to render a suit of interpleader proper. The goods were the property of *Bazeley* and *Hansbrow*, and the Plaintiffs, as their bailees, ought to have disregarded the claim of *Coupland* and *Duncan*, which was utterly unfounded. *Coupland* and *Duncan* were, in fact, only the agents of the Plaintiffs, and any claim by

(a) 2 Anst. 529.

(b) 1 Sim. 385.

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them was the claim of the Plaintiffs in another shape. But, at least, it was irregular to bring an interpleading suit to a hearing. It ought to have been disposed of upon motion. It was wholly inconsistent with principle and practice in such cases, that the Plaintiffs should enter into evidence, in support of their case, against the

[*440] *Defendants: interpleader always supposed that no adverse question existed as between the Plaintiffs and the Defendants, and that the question was only between the co-Defendants.

VICE-CHANCELLOR :—

The first question is, whether the subjects of these suits are, upon the pleadings, proper subjects of interpleader; and I am of opinion, that they are so. I admit, that, where a warehouseman, or other depositary of property, receives such property as bailee for another, and nothing is afterwards done by the party making the deposit before he claims to have the property restored to him, the possession of the depositary must, in many cases and for many purposes, be considered as the possession of the party making the deposit. The relation of the parties in such circumstances may often be analogous to that of landlord and tenant, in which the latter might be precluded from disputing the title of the former, in whomsoever the legal or equitable ownership of the lands in question may really be. This is explained by Lord *Cottenham*, in *Crawshay v. Thornton* (a), to which it is sufficient to refer. But the case assumes a widely different aspect, where, after the deposit is made, the party making it has, by an act of his own, transferred his interest in the subject of the deposit to another. It is clear, that, in such a case, the bailee may compel the depositor to interplead with the party to whom, by the act of the depositor, the property in the goods has been transferred.

In the present case, moreover, the Defendants, the assignees of *Bazeley*, who object to the propriety of the *suit,

[*441] have submitted to the injunction since the month of July,

(a) 2 Myl. & Cr. 1.

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1839; and since that time, the other Defendants have relied upon having their rights decided in this suit. For any thing which appears, this question could as conveniently have been tried upon motion in 1839 as upon the present hearing. In *Martinius v. Helmut* (a), which came before Lord *Eldon*, in 1817, he observed, that he did not remember any case of a bill of interpleader having been brought to a hearing.

On the next question, with regard to the supplemental suit, I agree with the argument, that the interest upon the principal monies ought, in strictness, to have been made the subject of amendment of the original suit, and that the supplemental bill must be irregular, unless it can be sustained upon other grounds.

The case of *Smith v. Target* (b), which was cited in support of the objection to the supplemental bill, on the ground of the amount of the principal monies thereby brought into contest being too small to be made the subject of an interpleading suit, is certainly, to some extent, an authority in favour of that objection. There, however, the Court obviously thought that, apart from this objection, there was another objection to the bill, which was fatal to it. But, even if that be not so, does the practice of this Court agree with the practice as stated in that case? The office of an interpleading suit is not to protect a party against a double liability, but against double vexation in respect of one liability. If the circumstances of a case shew that the Plaintiff is liable to both claimants, that is no case for interpleader. It is of the essence of an interpleading suit, that the Plaintiff shall be liable to one only of the claimants; and [*442] the relief which the Court affords him is against the vexation of two proceedings on a matter which may be settled in a single suit; *Crawshay v. Thornton*; *Suart v. Welch* (c); *Jew v. Wood* (d). How then can the amount of the stake affect the Plaintiffs' right to compel the litigant parties to interplead? The expences of a law suit are not necessarily dependent on the amount of the sum in dispute; and the vexation of double proceedings can scarcely be considered less because they relate to a small matter. If the claimants,

(a) 2 Ves. & B. 412, n.

(c) 4 Myl. & Cr. 305.

(b) 2 Anst. 529.

(d) 1 Cr. & Ph. 185.

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upon one of whom the expence of the interpleading suit must fall think the subject of it worth pursuit, they cannot complain that the holder of the stake prefers to be a party in one suit rather than in two, for settling their disputes. I cannot, therefore, satisfy myself that the practice of this Court is such as the argument supposes, in support of which *Smith v. Target* was cited.

The case before me is, however, distinguishable from the case in *Anstruther*, by the circumstance, that the sum of 6*l.* 16*s.* 6*d.*, the subject of the supplemental bill in this case, is but a part of a larger demand,—provided it can be shewn that the Plaintiffs were bound to bring that sum into contest in these proceedings, and that a supplemental bill is not an irregular mode of doing so.

It is insisted, however, that the subject of the supplemental bill ought to have been embraced in the original bill; and to this argument, so far as it applies to the interest, I have already expressed my assent. The only remaining question on this point, and, in fact, the only question on which I have felt any difficulty, is, whether the supplemental bill was the proper form of proceeding as [*448] regards the sum of 6*l.* 16*s.* 6*d.*? It obviously involves a question of costs, and nothing more. As a matter of strict practice, my opinion is in favour of the regularity of the proceeding. I cannot doubt that the Plaintiffs were bound to bring into contest in these proceedings, in some way or other, whatever funds should, before the termination of the suit, come into their hands, upon which the decision of the Court ought properly to operate; nor can I doubt that their omission to do so would have formed a just ground of charge against them at the hearing. The refusal of one class of Defendants to recognise the original suit as an interpleading suit, made it impracticable for the Plaintiffs to act otherwise, in framing the suit, than as in the case of a hostile proceeding. Then, have the Plaintiffs chosen the proper mode of bringing the additional matter before the Court? If, from the proceedings, I had just ground for believing that a wilful or careless disregard of expence to others could be imputed to the Plaintiffs in filing the supplemental bill, and was persuaded that the 6*l.* 16*s.* 6*d.* could regularly have been brought into the original suit, I should certainly take the

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same course as I did in *Dyson v. Morris* (a), and throw upon the Plaintiffs the excess of costs occasioned by the proceeding. But I do not find ground for imputing any such conduct to these Plaintiffs. The 6l. 16s. 6d. had not, in fact, been received at the time of filing the original bill. I do not know what the situation of that sum then was; nor can I hold, upon any thing which appears in evidence, that the Plaintiffs were under any obligation to charge themselves with a sum which they had not then received. The receipt, being after the original bill was filed, was *prima facie* the subject of a supplemental suit; and I cannot impute vexatious conduct to the parties, because they did not, in these causes "speculate [*444] upon being able to introduce supplemental matter into the original bill, at the possible expense of vitiating that proceeding. Acquitting the Plaintiffs of vexation or culpable carelessness, I cannot, as matter of strict practice, charge them with irregularity in instituting the supplemental suit.

I think, however, the Plaintiffs must pay the costs of, and occasioned by, the evidence they have gone into; and also the costs of the affidavits, upon which the motion for the injunction in the original cause was made, beyond that part which consists of the usual affidavit required in support of a bill of interpleader. The Plaintiffs must also pay the costs of the motion for the injunction in the supplemental suit. At the time that bill was filed, the injunction in the original suit had been submitted to for several months, and no proceedings were threatened in respect of the subject of the supplemental bill. As a Plaintiff in interpleader takes his costs out of the fund in his hands, he should be cautious to avoid burthening that fund to an extent beyond what his own protection may require. I think it right to add, to guard myself on this point, that vexatious conduct, or culpable negligence, on the part of a Plaintiff, in the prosecution of an interpleading suit, whereby needless expense is occasioned, ought, in my opinion, to be visited, in all cases, with costs against the Plaintiff.

The costs, other than those which I have excepted, will follow the usual course. If the Defendants differ as to the form of proceeding

(a) *Ante*, p. 428.

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necessary or proper to try their rights to the subject of the suit, the case may be mentioned again upon that point.

[445]

RAIKES v. WARD

March 2 and 7.

Under a gift by a testator to his wife of his residuary personal estate, to the intent that she might dispose of the same for the benefit of herself and their children in such manner as she might deem most advantageous, the wife does not take an absolute interest.

THE will of *George Raikes*, dated the 15th of November, 1838, was as follows:—"I give to my dear wife *Marianne* all my monies, securities for money, goods, chattels, and personal estate whatsoever, to the intent that she may dispose of the same for the benefit of herself and our children, in such manner as she may deem most advantageous. And I make and appoint my said wife sole executrix of this my will." The testator died, leaving his widow (the said *Marianne*) and eleven of their children surviving. The bill was filed by the widow, for a declaration of the respective interests of herself and children in the personal estate of the testator, under the will. The children were Defendants.

Mr. *Temple* and Mr. *G. L. Russell*, for the widow, argued that she was entitled absolutely to the entire residuary personal estate (a).

Mr. *Boteler* and Mr. *Faber*, for the defendants, contended that the bequest created a trust for the children. The authorities cited were,—*Sprange v. Barnard* (b), *Andrews v. Partington* (c), *Cooper v. Thornton* (d), *Robinson v. Tickell* (e), *Hammond v.*

(a) The particular grounds which were the foundation of the arguments, are distinguished in the judgment.

(b) 2 Bro. C. C. 588.

(d) *Id.* 96, 186.

(c) 3 Bro. C. C. 60.

(e) 8 Ves. 142.

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Neame (a), *Hamley v. Gilbert (b)*, *Curtis v. Rippon (c)*, *Chambers v. Atkins (d)*, **Benson v. Whittam* [*446] *(e)*, *Blakeney v. Blakeney (f)*, *Taylor v. Bacon (g)*, *Wetherell v. Wilson (h)*, *Woods v. Woods (i)*, *Hadow v. Hadow (k)*, *Jubber v. Jubber (l)*, and 2 *Roper, Tr. Legacies*, 373.

VICE-CHANCELLOR, after stating the facts :—

The Plaintiff seeks the direction of the Court, but submits that she is entitled to the property absolutely. The Defendants insist that the Plaintiff, either wholly or to some extent, is a trustee for them.

In support of the Plaintiff's case, it was argued,—first, that the bequest to a person, the better to enable him to accomplish a given act or discharge a given duty, vests the property in that person absolutely; and, secondly, that a bequest to a person in terms which, according to the language of the reported cases, are precatory only, in behalf of certain objects of the testator's favour, does not create a trust, unless the amount of the fund to which the precatory words apply is also certain; and that, where the legatee has power to dispose of the fund at pleasure, to an extent not defined by the will, no trust is created, but the property vests absolutely in the legatee. And it was said that the case before the Court falls within the scope of both of the above principles.

On the part of the Children it has been argued, that the words of this will are not within the scope of the cases upon which the former proposition depends. *The will, it was said, [*447] clearly creates a trust in favour of the children of the testator, unless the latter proposition, relied upon by the Plaintiff, prevents the Court from executing it. And, with respect to the

(a) 1 Swanst. 85.

(c) 5 Madd. 434.

(e) 5 Sim. 32.

(g) 8 Sim. 100.

(i) 1 M. & Cr. 401.

(l) 9 Sim. 503.

(b) Jac. 354.

(d) 1 Sim & Sta. 382.

(f) 6 Sim. 52.

(h) 1 Keen, 80.

(k) 9 Sim 438.

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latter proposition, the Defendants have argued that the relation in which the testator, the Plaintiff, and their children stand to each other, is such that, according to the decided cases, the Court has the power to measure the extent of the Plaintiff's obligations to her children, and that this power reduces the interest of the children to that certainty which the Court requires.

Of the reported cases which bear on the case before me, the first which I shall mention is *Burrell v. Burrell* (a), where the gift was to the wife of the testator, "to the end she might give his children such fortunes as she should think proper, or they best deserve." The wife made an appointment by will; and one of the children being dissatisfied with it, filed his bill, insisting that the appointment was illusory. Lord *Camden* gave his judgment at large, and decided that the appointment was not illusory. From this case, it is clear, that the bequest was not, at that day, thought to be an absolute gift to the wife, for, if that had been so, there would have been no question of illusory appointment. In the case of *Brown v. Casamajor* (b), the bequest was of a sum of 7000*l.* to a father, "the better to enable him to provide for his younger children." The father consented to the order which was made for securing the capital, with liberty to the children to apply; and afterwards, upon petition, the interest was ordered to be paid to the father for his life. From the language of the *Lord Chancellor*, in that case, it is clear, at that time, it was considered that the relation of parent and child was such that the Court could, as between them,

[*448] "measure the extent of the trust. The case of *Hamley v. Gilbert* (c) shews that, where the maintenance of the objects of the testator's favour is one of the purposes of the gift, that is a benefit which is capable of being measured. *Thurston v. Essington*, (d) also, does not exclude maintenance, as a well-constituted trust. The words of the gift in *Broad v. Bevan* (e) were very indefinite. "I give and bequeath to my daughter *Ann*, now living with me, the sum of 5*l.* a-year for her life, payable half yearly by my executor. I also order and direct my son *Joseph* to

(a) *Ambl.* 660.(b) 4 *Ves.* 498.(c) *Jac.* 354.(d) *Id.* 361, n.(e) 1 *Russ.* 561, n. (a).

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take care of and provide for my said daughter during her life." And the testator made his son residuary legatee and executor. In that case it was held that the daughter had a beneficial interest, and a reference was directed to the Master. I have a note of an unreported case of *Roberts v. Smith*, which was before Sir *J. Leach*, where the residuary real and personal estate was given to trustees, as to half, for the wife for her life, for the support of herself and the education of her children. The point, I believe, was not decided by the Court; but Mr. *Bell* advised that a trust was created for the benefit of the children. *Wetherell v. Wilson* (a) is a very strong case. The interest of a fund was directed to be paid to the husband, in order the better to enable him to maintain the children of the marriage until their shares should become assignable to them. The husband assigned all his property to trustees for the benefit of his creditors; and it was held, that there was a trust for the children, and, therefore, that the interest of the fund did not pass under the assignment. This, I presume, was on the ground that the Court could measure the extent of the obligation which was imposed upon the husband by the words of the instrument. In all these cases the Court, without laying down any positive rule, has referred it to the Master to inquire of the extent and manner in which the intended gift should be applied for the benefit of the parties indicated.

It is true that the Court has, in these cases, very commonly ordered the fund to be paid to the legatee. But, upon that point, the *Lord Chancellor*, in the case of *Woods v. Woods* (b), made important observations. The testator, after directing a sale of his property (if necessary) to pay his debts, said, "If sold, all overflush to my wife, towards her support, and her family, if any there be." The point argued upon demurrer was, that the wife took absolutely. In that case the *Lord Chancellor* said:—"It is clear that, if the contemplated event took place, a trust as between the widow and the children would be created. The cases which were cited to support the demurrer have no application to this point. They only

(a) 1 Keen, 86.

(b) 1 Myl. & C. R. 401.

1842.—*Raikes v. Ward.*

decide that, where a gift is made to a person, and a trust created in that person, the Court may safely and properly pay over the fund to the individual who is such trustee ; but they are far from deciding that the person, to whom the payment is so to be made in that character, shall not be accountable for the fund to those for whose benefit the trust is created.”—“ Now I have already stated it to be my clear opinion, that, in a certain event—the event namely of a sale, the widow would take the property subject to a trust, and that that trust would be not only for the eldest son but also for the other members of the family.” The *Lord Chancellor*, therefore, only said it was true that, where the fund was given to the parent to provide for the children the fund might be safely paid to the parent ; but he decided that a trust was created for the benefit of the children.

[*450] “In addition to those I have mentioned, there are the cases of *Chambers v. Atkins* (a), *Foley v. Parry* (b), *Hadow v. Hadow* (c), *Jubber v. Jubber* (d). I cannot but consider these authorities as raising a formidable obstacle to the Plaintiff's claim to an absolute interest in the property of the testator. At the same time, I have no hesitation in stating, that, to whatever extent the widow or family of Mr. *Raikes* may have an interest in his estate, after satisfying the paramount claims of creditors, the Court will not deprive the widow of the honest exercise of the discretion which the testator has vested in her, or refuse its assistance to inquire into or to sanction any reasonable arrangements which she may desire to make. Further than this I cannot go in the present state of the cause (e).

When the proper time for distributing the estate shall have arriv-

(a) 1 Sim. & Stu. 332.

(b) 5 Sim. 138. Affirmed on appeal; 2 Myl. & K. 138.

(c) 9 Sim. 438.

(d) Id. 503.

(e) The bill was filed solely to obtain the declaration of the Court upon the above point; and, after the argument, it appeared that the accounts had not been taken, and, it was admitted, that some debts remained unpaid. His Honor said, that, without laying it down as a general rule, in no case could the Court safely declare the rights of the parties until the fund was cleared in respect of which the declaration was to be made, yet in this case, although he had expressed his opinion on the point on which the parties desired his judgment, he would make no declaration until the fund was ascertained.

 1842.—*Crocket v. Crockett*.

ed, it may perhaps deserve consideration (although I mean not to express any opinion upon the point) how far the late statute 1 Will. 4, c. 46, may have enlarged the power of Mrs. *Raikes* as between her and her children, supposing she should be held a trustee for them. The only decree I now can make is the usual decree for an account, in order to clear the fund.

**CROCKETT v. CROCKETT*.

[*451]

March, 17, 21.

The testator directed that all and every part of his property should be at the disposal of his wife for herself and her children. The widow took out administration to the testator's estate, and executed a voluntary deed, whereby she settled the greater part of the fund of which the estate consisted, upon trust for herself for life, with remainder to her children :—*Held*, that, under the will, the children took an interest in possession in the property of the testator at his decease, and that the settlement was not binding upon them, and, consequently, was not binding upon the widow. And the mother maintaining and educating the children in a proper manner, the whole of the income of the residuary estate was ordered to be paid to her during the infancy of the children, or until further order, with liberty to her and her children to apply.

J. CROCKETT, by his will, dated Macao, 15th March, 1831, directed, "that all and every part of his property should be at the disposal of his most true and lawful wife, *Caroline Crockett*, for herself and her children, in the event of any unforeseen accident happening to himself;" and he recommended the arrangement of all his affairs to the management of his friend, *J. Gower*.

The testator died at Macao on the 25th of June, 1837, and administration of his estate, with his will annexed, was granted by the proper authorities at Macao to his widow, *Caroline Crockett*, the Defendant. Five children of testator survived him, three of whom were living at the date of his will.

The widow was advised, that, under the will, she was absolutely entitled to the whole of the testator's property to her own use; and she executed a voluntary deed dated the 30th of September, 1837, directing that 15,000*l.*, part of the testator's estate, should be re-

1842.—*Crockett v. Crockett.*

mitted to this country; and by the same instrument, she settled that sum upon trust for herself for life, if she should so long remain unmarried, and, after her death or marriage, upon trust for the five children of the testator. One of the children afterwards died. The bill was filed by the four surviving children against the widow and administratrix for an account of the testator's estate, praying

a declaration that the children were entitled to [*452] the testator's property jointly with the widow, and that the deed of the 30th of September, 1837, was not binding upon them. The sum of 15,000*l.* having been remitted according to that deed, was, in December, 1838, paid into Court in this cause, and laid out in the purchase of 16,129*l.* 0*s.* 8*d.* consols, the dividends of which were ordered to be paid to the Defendant. The decree directing the necessary accounts and inquiries of the state of the family, was made in February, 1840. In November, 1841, the Master made his report, and found that the residuary estate of the testator consisted of the fund in Court,—of another sum of 1,900*l.* consols, purchased by and still standing in the name of the testator, and of a sum of 1,119*l.* 19*s.* 4*d.*, owing by the administratrix to the estate. On the hearing for further directions,—

Mr. Boteler and Mr. Roundell Palmer, for the Plaintiffs, argued, that, under the will, the children took the estate with the Defendant in joint-tenancy, and that the share of the deceased child had devolved upon the survivors. The cases proceeded on the principle, that children born at the date of the will were personæ designatæ: *Wilde's case* (a); *Cook v. Cook* (b); *Alcock v. Evans* (c); *Oates v. Jackson* (d). And the benefit of the same principle was given to children living at the death of the testator: *Buffar v. Bradford* (e). They cited also *Jubber v. Jubber* (f); *Woods v. Woods* (g); *Cutbush v. Cutbush* (h); *Vaughan v. Marquis of Headfort* (i); *Blackwell v. Bull* (k); *Malim v.* [*453] *Keighley* (l). "If the true construction of the will was,

(a) 6 Rep. 17 b.

(d) 2 Str. 1172.

(g) 1 Myl. & Cr. 401.

(k) 1 Keen, 176.

(b) 2 Vern. 545.

(e) 2 Atk. 220.

(h) 1 Beav. 184.

(l) 2 Ves. jun. 333.

(c) Freem. 185.

(f) 9 Sim. 503.

(i) 10 Sim. 639.

 1842.—Crockett v. Crockett.

that the widow and children were joint-tenants, the settlement could not affect the interests of the children, although it bound the interests of the widow, the settlor.

Mr. *Sharpe* and Mr. *Goldsmid*, for the Defendant, argued, first, that the widow took absolutely; or, secondly, that she took an estate for life, with remainder to her children; thirdly, that the children, if any, who were interested in the property, would be all the children of the Defendant, including the children of any future marriage which she might contract; fourthly, that the settlement must either stand as a binding instrument for all its purposes, or that it must be declared wholly void, as well in respect of the interest of the Defendant as of that of the children: *Robinson v. Tickell* (a); *Cooper v. Thornton* (b); *Bushnell v. Parsons* (c); *Curtis v. Rippon* (d); *Hammond v. Neame* (e); *Morse v. Morse* (f); *Cavanagh v. Hardiman* (g).

Mr. *Stinton*, for the trustees of the settlement, who disclaimed.

Mr. *Roundell Palmer*, replied.

VICE-CHANCELLOR, after stating the facts said:—

In the late cause of *Raikes v. Ward* (h), I had occasion to consider a case somewhat resembling the present. [*454] The will in that case gave the residue of the testator's property to his widow, with the declaration that it was to the intent that she might dispose of the same for the benefit of herself and their children in such manner as she might deem most advantageous; and he made her sole executrix. In that case, as in this, the widow claimed the property of the testator absolutely; although I was not compelled to decide the question in that cause, I satisfied myself, after an examination of most of the authorities, that, in several cases much more favourable to the claim of the widow than the present, the

(a) 8 Ves. 142.

(c) Proc. Cha. 218.

(e) 1 Swanst. 25.

(g) Ambler, ed. by Blunt, 512, n.

(b) 3 Bro. C. C. 96. 186.

(d) 5 Madd. 434.

(f) 2 Sim. 485.

(h) Supra, p. 445.

1842.—Crockett v. Crockett.

Court had held, that the children of the testator took an interest in his property. The cases to which I then referred were, *Burrell v. Burrell* (a); *Brown v. Casamajor* (b); *Hamley v. Gilbert* (c); *Roberts v. Smith* (d); *Broad v. Bevan* (e); *Wetherell v. Wilton* (f); *Hadow v. Hadow* (g); *Jubber v. Jubber* (h); *Woods v. Woods* (i); and also the case of *Chambers v. Atkins* (k).

In the case of *Woods v. Woods*, Lord Cottenham explains the cases (such as *Robinson v. Tickell*, *Cooper v. Thornton*, and others to a similar effect) in which the whole property was, by the Court, committed to the parent, by saying that the Court, in such cases, only meant to decide that the property might safely be so committed, and not that the parent was entitled to it absolutely, to the exclusion of the children.

In the argument of this case many authorities were cited in addition to those I have mentioned. In the "pres- [455] ent state of the authorities, and of the family and property of the testator, I think the safest course I can take is, to have the whole fund in Court,—to declare that the children took an interest in possession in the testator's property at his decease under the testator's will; and that the deed of the 30th of September, 1837, is not binding upon them, and, as a consequence thereof, but not otherwise, that the same is not binding upon the widow; and to direct that the whole income of the testator's residuary estate be paid to the mother during the infancy of the children, or until further order, she maintaining and educating the children in a proper manner, with liberty for the widow and children to apply.

This accords with the form of the order in some of the more modern cases. The declaration, that the children took an interest in possession in the property under the will, and that the deed of the 30th of September, 1837, is not binding upon them, will enable the Defendant to appeal from my decision; and the liberty I give her

(a) Amb. 660.

(c) Jac. 354.

(e) 1 Ru s. 511, n. (a).

(g) 9 Sim. 438.

(i) 1 Myl. & Cr. 401.

(b) 4 Ves. 498.

(d) M. S. Not reported.

(f) 1 Keen, 80.

(h) Id. 503.

(k) 1 Sim. & Sta. 382.

 1842.—Tollemache v. Tollemache.

to apply will enable her to apply the property at any time under the direction of the Court in any manner which would be consistent with my declaration of the interests of the children. An application by the widow for the whole property would, of course, be rejected as being inconsistent with the declaration I make. An application for part, subject to the right of the children to maintenance and education, or an application for part for the advancement of a child, would be dealt with on its merits. At present, I can only negative the absolute claim of the Defendant, and reserve for consideration any specific claim she may hereafter make.

 •••

 *TOLLEMACHE v. TOLLEMACHE.

[*456]

1842: March 7, 8.

Form of the reference to inquire whether it is proper to cut timber, during the continuance of the estate of a tenant for life of the lands, impeachable of waste.

THE bill, which was by a tenant in tail in remainder, expectant on certain estates for life, against the tenants for life, stated, that there were standing upon the settled estates divers timber trees of sufficient age to be felled, which were not ornamental, and did not afford protection or shelter to the mansion-house, and which would not improve by standing, but, on the contrary, some of them were in a state of decay; and that it would be beneficial to the Plaintiff, and to all the parties interested in the estate, that such trees should be cut down and sold, and the money laid out in the purchase of lands to be settled to the like uses. The tenants for life were impeachable of waste. The bill prayed, that it might be referred to the Master to inquire whether it would be proper, and for the benefit of the Plaintiff and the other parties, that any of such trees should be felled; and if the Master should find that it would be proper that any of such trees should be felled, then that the same might be ordered to be cut down and sold, and the proceeds of such sale secured and invested accordingly.

1842.—*Tollemache v. Tollemache*.

Mr. *Piggott*, for the Plaintiff.

Mr. *Geldart*, for the Defendant.

THE VICE-CHANCELLOR made an order of reference in the same form as that which was made by the decree in the case of *Tooker v. Annesley* (a). His Honor observed that, in the case [*457] of *Hussey v. Hussey* (b), Sir J. **Leach* said, that, where the author of the settlement had made the tenant for life impeachable of waste, he had, in effect, signified his intention that no timber should be cut during the continuance of the life estate. The Court would not, upon considerations of expediency, go against the intention of the settlor, unless it were to prevent actual waste or destruction of property from taking place. In *Mildmay v. Mildmay* (c), the Plaintiff, an infant, was tenant in tail in remainder, and the Defendants were the tenants for life, and other parties interested. The timber was fit to cut, and in danger of running to decay ; and the Court ordered it to be cut. Upon the cause coming on after the report was made, the Lord Commissioner *Eyre* said, that the claims of the tenants for life would be open when the tenant in tail should come of age ; and he thought that the Court had done wrong in doing for the tenant in tail what he could not have done for himself, but that, when he should come of age, the respective claims must be discussed on a bill, and in the meantime the money should be invested. The cases of *Delapole v. Delapole* (d), and *Wickham v. Wickham* (e), proceeded on the ground that the trees were in a state of decay ; and in the *Attorney-General v. The Duke of Marlborough* (f), the same principle was applied.

(a) See 5 Sim. 237.

(c) 4 Bro. C. C. 76.

(e) 17 Ves. 151.

(b) 5 Madd. 44.

(d) 19 Ves. 420.

(f) 5 Madd. 280.

1842.—*M'Fadden v. Jenkyns.*

**M'FADDEN v. JENKYNs.*

[*458]

1842: March 22, and April 15.

Injunction granted upon motion to restrain, until the hearing of the cause, an action by an administrator to recover a debt which was formerly due to his intestate,—upon affidavit that the intestate had requested the debtor to hold the sum due in trust for the Plaintiff, and that the debtor had accepted the trust, and paid over a part of the fund to the Plaintiff.

Whether the facts stated by the affidavit, if proved, would be sufficient to create a trust in favour of the Plaintiff—*quære*.

In February, 1840, the Defendant, *Jenkyns*, borrowed of *Thomas Warry* the sum of 500*l.* *Thomas Warry* died on the 22nd of December, 1841, and administration to his estate and effects was granted to the Defendant, *George Warry*. In January, 1842, *George Warry*, as the personal representative of *Thomas Warry*, commenced an action against *Jenkyns* for the recovery of the 500*l.* and interest. The present bill was thereupon filed against *Jenkyns*, the debtor, and *George Warry*, the administrator, stating, that the said sum of 500*l.* was lent to *Jenkyns*, and was to have been repaid in a few days,—that, in May, 1840, *Thomas Warry*, the intestate, orally directed one *Bartholomew* to desire *Jenkyns* to hold the 500*l.* upon trust for the Plaintiff, and at her disposal, for her own use and benefit,—that *Bartholomew* accordingly communicated the directions of the intestate to *Jenkyns*,—that *Jenkyns* accepted the trust,—that the trust had been executed in part by the payment to the Plaintiff of 10*l.* by *Jenkyns* out of the 500*l.*,—and that *Thomas Warry*, the intestate, had never demanded the 500*l.*, or the interest thereon, from *Jenkyns*, after May, 1840; and praying that it might be declared that *Jenkyns* was a trustee for the Plaintiff of the said sum of 500*l.* and interest, and that the Plaintiff was beneficially entitled thereto, and that the Defendant, *George Warry*, might be restrained from prosecuting the action for the recovery of the same.

The motion for the injunction was made.

 1842.—*M'Fadden v. Jenkyns*.

[*459] *Mr. *Sharpe* and Mr. *G. L. Russell*, for the Plaintiff, argued, that, by the circumstances, an irrevocable trust of the sum in question had been created by the intestate in favour of the Plaintiff: the action was wholly unnecessary, and would decide nothing. In addition to the cases mentioned in the judgment, they cited *Wright v. Wright (a)*.

Mr. *Wakefield* and Mr. *Kenyon*, for the Defendant, *Warry*.—There was nothing in the merely oral communication made to *Jenkyns*, through *Bartholomew*, (even if that were proved, and it was not admitted), which, in equity, would create a trust for the Plaintiff, or, at law, divest the intestate of his right to recover the debt. And there was no consideration upon which the Court would interfere to give effect to that which was, at the utmost, an incomplete manifestation of intention, which the intestate had never deprived himself of the power to change. The motion must, on every ground, be refused, for the money could not properly remain in the hands of the debtor, and the Defendant was the only party who could legally recover it. The action for that purpose was, therefore, obviously proper. Besides the cases which are adverted to in the judgment, they cited *Taylor v. Lendey (b)*, and *Tate v. Hilbert (c)*.

VICE-CHANCELLOR:—

This motion has been made on affidavits, and no objection was taken to their admissibility; which I observe, not for the purpose of throwing doubt upon their admissibility, but only as one
[*460] of the circumstances shewing what *the case is I have been required to exercise a judgment upon. The Plaintiff, *Jenkyns*, and *Bartholomew*, have all made affidavits in support of this motion; and the personal respectability of the two latter persons was admitted at the bar by the counsel for the Defendant, *George Warry*. Their testimony, in support of the Plaintiff's case,

(a) 1 Ves. 409. (b) 10 East, 49. (c) 4 Bro. C. C. 291; S. C. 2 Ves. jun. 111.

 1842.—M'Fadden v. Jenkyns.

is so far direct and positive, that, upon that evidence alone, I could not say that the Plaintiff had not sufficiently made out her case for the purposes of this motion, if the facts deposed to by *Jenkyns* and *Bartholomew* would entitle the Plaintiff to the equity she claims. The evidence for the Defendant does not, nor, from the circumstances of the case, could it be expected directly to, traverse the case made by the bill. But that evidence tends certainly to throw some degree of doubt and discredit upon the evidence for the Plaintiff. In this state of the evidence, the duty which the usual course of the Court imposes upon me in this stage of the cause, is to reserve my judgment upon the facts of the case merely, and to regulate my judgment upon this motion with reference to the other points before me.

Now, with respect to those other points, some of them appear to me to be sufficiently clear—First, it is plain that the trial of the pending action will decide nothing which, in this Court, would be conclusive between the parties. Secondly, it is clear that, inasmuch as the transaction, in respect of which the Plaintiff claims the debt in question, was not founded upon any valuable consideration, this Court will not, in any stage of the cause, lend its aid to perfect the Plaintiff's title. In other words, the Plaintiff must shew that such transactions were had in the life-time of *Thomas Warry* as would have entitled the Plaintiff as against him to maintain the same equity she now claims against his personal representative, *George Warry*. Thirdly, I think it may safely be stated, [*461] that, if *Thomas Warry* had in his lifetime so acted as to constitute himself a trustee of the debt for the Plaintiff, that, in equity, would establish the claim of the Plaintiff as against *Thomas Warry* and his estate. And, lastly, I think it is clear, upon the authorities, as an abstract proposition, that, in the case of personal property, a declaration of trust may be made without writing.

The first of these propositions depends upon the accuracy of the others. The second is manifest from the cases of *Colman v. Sarel* (a), *Ellison v. Ellison* (b), *Adams v. Claxton* (c), *Antrobus v.*

(a) 1 Bro. C. C. 12; S. C. 1 Ves. jun. 50.

(b) 6 Ves. 656.

(c) 6 Ves. 225.

1842.—M'Fadden v. Jenkyns.

Smith (a), *Cotteen v. Missing (b)*, *Pulvertoft v. Pulvertoft (c)*, *Ex parte Pye*, *Ex parte Dubost (d)*, *Edwards v. Jones (e)*, and the late case of *Dillon v. Coppin (f)*, before Lord Cottenham. The third point stands upon the direct authority of Lord Eldon, in *Ex parte Pye*, and *Ex parte Dubost*, followed by the Master of the Rolls in *Wheatley v. Puri (g)*, *Collinson v. Patrick (h)*. To the above ought, perhaps, to be added the cases of *Sloane v. Cadogan (i)* and *Fortescue v. Barnett (k)*, as explained by Lord Cottenham in *Edwards v. Jones*, also the principle of the case of *Flower v. Marten (l)*, and the authorities there cited. The last point is sufficiently established

by the cases cited at the bar (*m*), to which many other
 [*462] *authorities might be added. Such appears to me to be the state of this case with respect to the points which were made at the bar: and I have thought it right to mention the above authorities, in order, if it should be thought advisable to have my decision upon this motion reviewed, that the principles established by the cases referred to, in their application to this particular case, may be fully considered.

There may be difficulty in reconciling with each other all the cases which have been cited. Perhaps they are to be reconciled and explained upon the principle, that a declaration of trust purports to be, and is in form and substance, a complete transaction, and the Court need not look beyond the declaration of trust itself, or inquire into its origin in order that it may be in a position to uphold and enforce it; whereas an agreement or attempt to assign is, in form and nature, incomplete, and the origin of the transaction must be inquired into by the Court: and where there is no consideration, the Court, upon its general principles, cannot complete what it finds imperfect. There is a close analogy for this reasoning in the case of suits to enforce demands arising out of illicit dealings between parties. If, in

(a) 12 Ves. 39.

(b) 1 Madd. 176.

(c) 18 Ves. 84.

(d) 18 Ves. 140.

(e) 2 Myl. & Cr. 226.

(f) Not yet reported.

(g) 1 Keen, 551.

(h) 2 Keen, 123.

(i) 3 Sug. Vend. & Pur., p. 66, ed. 10. Appendix, xxvii. (k) 3 Myl. & K. 36.

(l) 2 Myl. & Cr. 459.

(m) *Nab. v. Nab*, 10 Mod. 404; *Fordyce v. Willis*, 3 Bro. C. C. 577; *Bayley v. Boulcott*, Russ. 345; *Benbow v. Townsend*, 1 Myl. & Cr. 306.

 1842.—*M'Fadden v. Jenkyns*.

such cases, the Court finds an account rendered, or other act done by one of the parties, upon which account or act the Court can proceed without investigating the origin of the demand, it will do so(a). But it will not so proceed where the form of the transaction is such as to oblige the Court to go into the original illegal transaction, out of which the demand arises. It is unnecessary, however, to pursue that question in the present stage of the cause. The difficulties both of law and fact, are so great that I think I [463] ought not to decide on the rights of the parties upon motion. The state of the authorities, and especially the cases lately decided at the Rolls, make it proper that I should reserve my judgment upon the whole case until the hearing of the cause. When the evidence has been taken, the case may more clearly appear, and be relieved of much of its difficulty. It is clear that the Plaintiff cannot ultimately succeed, unless she can make out that, with reference to a debt in question, the relation of trustee and cestui que trust was completely established in her favour in the lifetime of *Thomas Warry*.

The bill prays only, that *Jenkyns* may be declared a trustee for the Plaintiff of the sum in question. The Plaintiff will consider how far she may possibly relieve the Court from a formal difficulty at the hearing of the cause, by amending the bill, and treating both of the Defendants, or, in the alternative, either of them, as trustees or a trustee for her. The observations of Lord *Cottenham* in *Edwards v. Jones*, and the case of *Wheatley v. Purr*, suggest this remark.

Upon the submission which has been made at the bar to bring the money into Court, it must be ordered to be brought in, and the action must be stayed.[1]

Affirmed by the Lord Chancellor, Nov. 4, 1842.

(a) *Davenport v. Whitmore*, 2 Myl. & Cr. 177; and the cases there cited.

[1] See the case reported 1 Phil. 152. and note 2 on page 157, 158.

1842.—Meek v. Kettlewell.

[*464]

*MEEK v. KETTLEWELL.

1842 : April 30. May 2. 23.

M., who in the event of surviving her daughter, and of the death of her daughter without issue, would, as next of kin, be entitled to a fund, which was vested in trustees, executed a voluntary assignment of her interest in the fund, to the husband of the daughter, and declared the trusts of the assignment, as to part for the benefit of M. herself, and as to another part for the daughter's husband absolutely. No notice of the assignment was given to the trustees. The daughter afterwards died without issue; and the husband filed his bill against the trustees and M. to compel the performance of the trust :—*Held*, that the voluntary assignment did not create a trust which a court of equity would enforce; and the bill was dismissed.

JOHN KETTLEWELL, by his will, dated the 4th of August, 1838, devised all his real estate to trustees, upon trust to pay the rents, issues, and profits thereof to his daughter, *Hannah Kettlewell*, during her life, for her sole and separate use, and after her decease he directed that his said trustees should stand seised of his said real estate in trust for such child or children of his said daughter, living at her decease, as she should by will appoint, and in default of appointment in trust for such child or children in equal shares, and in default of such issue upon such trusts as his daughter should by will appoint. And the testator bequeathed to the said trustees the sum of 11,000*l.*, upon trust to place the same out at interest upon government or real securities, and directed that they should stand possessed of the same, and the dividends and interest thereof upon the same trusts, in favour and for the benefit of his said daughter and her children as are thereinbefore declared of his real estate, or as near thereto as the nature of the property, and the rules of law, admit; but if his daughter should have no child living at her decease, then as to the sum of 100*l.* (part of the said sum of 11,000*l.*), in trust for *R. L. Dawson*, and as to the residue of the said sum of 11,000*l.* in trust for the next of kin of the testator's said daughter *Hannah* (exclusive of a husband), in a course of distribution according to the statute. The testator appointed the same trustees the executors of his will.

1842.—*Meek v. Kettlewell*.

On the 11th of March, 1839, the testator died, leaving the defendant, *Mary Kettlewell*, his widow, and also the "said *Hannah*, his daughter, surviving. The will was proved by [*465] the executors, and the 11,000*l.* was duly invested in their names.

On the 20th of June, 1839, *Hannah*, the daughter, married the Plaintiff, *J. Meek*, the younger.

By an indenture, dated the 10th September, 1839, and made between the Defendant, *Mary Kettlewell*, of the first part, and the Plaintiff, of the second part, reciting the will of the testator, and his death, and that the said Defendant, in the event of the death of the testator's daughter, without leaving issue her surviving, would become entitled to the residue of the 11,000*l.* as the next of kin of her said daughter, and reciting that the said Defendant had contracted and agreed with the Plaintiff to grant and assign the residue of the 11,000*l.* to him, his executors, administrators, and assigns, it was witnessed, that, in pursuance of the said contract, and in consideration of the natural love and affection of the said Defendant for the Plaintiff, as the husband of her daughter, and in consideration also of the sum of 10*s.* by the said *James Meek*, the younger, to the said Defendant paid, the receipt whereof was thereby acknowledged, the said Defendant, *Mary Kettlewell*, granted, bargained, sold, assigned, transferred, and set over unto the Plaintiff, his executors, administrators, and assigns, all that the said reversionary or expectant estate of her the said Defendant, of, in, and to the said sum of 11,000*l.*, and of and in the interest and proceeds to grow due and payable for the same: and also the said sum of 11,000*l.* (after paying thereout the said sum of 100*l.*) and every part thereof, and all interest and proceeds thereafter to grow due or become payable for the same, upon trust, as to the said sum of 100*l.* (parcel of the said sum of 11,000*l.*), for the said *R. L. Dawson*, "according to the purport of the said will,—as [*466] to the sum of 3,000*l.*, other parcel of the said sum of 11,000*l.*, in trust for the said Defendant, her executors, administrators, or assigns, to and for her and their own absolute use and

 1842.—*Meek v. Kettlewell*.

benefit,—and as to the sum of 7,900*l*. (the residue of the said sum of 11,000*l*.), in trust for the Plaintiff himself, his executors, administrators, and assigns, to and for his and their own absolute use and benefit: and for the better enabling the Plaintiff to receive and take the said money and premises, the said Defendant constituted him, his executors, administrators, and assigns, her attorney, and attornies irrevocable, in her name to demand, receive, and take the said premises of and from the said trustees, or whom else it should concern to pay or transfer the same, upon the decease of the said *Hannah*, the daughter of the said testator, without issue her surviving; and then followed the usual power to the Plaintiff to give effectual receipts for the monies which he should receive, and the common covenants for good title, and for further assurance.

- On the 21st December, 1839, the Plaintiff signed a memorandum on the back of the indenture of the 10th of September, 1839, which was in the following words:—

“Memorandum,—That I, the within-named *James Meek*, the younger, at the request of the within-named *Mary Kettlewell*, and upon condition that the will of my dear wife, *Hannah*, dated the 23rd day of August last past, shall remain valid, unrevoked, unaltered, and uncanceled, at the time of my said dear wife’s death, have agreed, and do hereby agree, to allow and pay to the said *Mary Kettlewell* the further sum of 3,000*l*. out of the within-named sum of 7,900*l*. Witness my hand, this 21st day of December, 1839.”

On the 7th of January, 1840, *Hannah*, the Plaintiff’s [*467.] *wife, died without issue, and thereupon Defendant, her mother, became under the limitation in the will entitled to the 11,000*l*., subject to the payment of 100*l*. to *Dawson*. The fund remained standing in the names of the trustees, appointed by the testator. It did not appear that any notice had been given to the trustees, either of the assignment of the 10th of September, or of the subsequent indorsement thereon. The Defendant, *Mary Kettlewell*, did not consent to the application of the fund according to the terms expressed by the assignment, or the memorandum;

1842.—*Raikes v. Ward.*

and the trustees declined to act in conformity with those instruments without her sanction. The bill was then filed against the widow and the trustees, praying that the performance of the trusts of the indenture of assignment might be decreed.

Mr. *J. Russell*, and Mr. *Keene*, for the Plaintiff (a).

The Court is not called upon to interfere for the purpose of giving effect to an imperfect transaction, or even to compel a party to perform a voluntary contract. The declaration of trust is perfect,—the interest in the property to which it relates is equitable, and not capable of any other mode of transfer; and it is not necessary to require any further act to be done by the assignor. The assignment points out the duties of the trustees in respect to the fund: the trustees would be justified in acting upon the assignment, and they are bound to act upon it. All that the Plaintiff seeks, therefore, is to compel the trustees to perform a trust in the manner which the cestui que trust has directed, and which the trustees can have no ground for resisting. If the cestui que trust should see ground or occasion to repudiate the transaction, it is for the cestui que trust to "institute a suit for the purpose of [*468] cancelling the instrument or averting its consequences:

Colman v. Sarel (a); *Ellison v. Ellison* (b); *Antrobus v. Smith* (c); *Pulvertoft v. Pulvertoft* (d); *Buckle v. Mitchell* (e); *Ex parte Pye*, *Ex parte Dubost* (f); *Sloane v. Cadogan* (g); *Jones v. Croucher* (h); *Edwards v. Jones* (i); *Fortescue v. Barnett* (k); *Collinson v. Pattrick* (l).

Mr. *Sharpe*, Mr. *Wilbraham*, and Mr. *Willcock*, for the Defendant, *Mary Kettlewell*, argued, first, that she had not either at the time of making the instrument of September, 1839, or at the

(a) The arguments are stated ex relatione.

(a) 8 Bro. C. C. 12; S. C. 1 p. 66, ed. 10. Ves. jun. 50.

(b) 6 Ves. 656.

(c) 12 Ves. 39.

(d) 15 Ves. 24.

(e) 18 Ves. 109.

(f) 18 Ves. 149.

(g) 5 Sug. V. & P. App. xxvii.

(h) 1 Sim. & St. 315.

(i) 1 Myl. & Cr. 226.

(k) 3 Myl. & K. 24.

(l) 2 Keen, 122.

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time of making the subsequent memorandum, any interest which could pass by release or assignment: it was a mere possibility, and clearly distinguishable from an expectant interest which might be assigned for value.

Secondly, the object of the suit is to enforce the performance of a voluntary contract, and one which is necessarily executory. The trustees of the fund were not trustees on behalf of the Defendant, at the time the instrument was executed. Taken as declaration of trust, the instrument could only apply to some interest which existed at the time it was made. The character of a declaration of trust, which is sought to be imputed to it, cannot be implied from the circumstances which have since happened. That the Court will not enforce a voluntary contract, as against the party making it, is

clear: *Moth v. Frome* (a); *Beckley v. Newland* (b),

[*469] *Higden v. Williamson* (c); *Grey v. Kentish* (d);

Wright v. Wright (e); *Carleton v. Leighton* (f); *Weth-*

ered v. Wethered (g); *Hyde v. White* (h); *Lyde v. Mynn* (i);

Wheatley v. Purr (k); *Tufnell v. Constable* (l); *Holloway v.*

Headington (m); *Co Litt. (Butler)*, 265. a., n. 1.

Mr. Robson, for the trustees.

VICE-CHANCELLOR:—

The Plaintiff in this case has filed his bill to obtain the benefit of a trust declared in his favour, upon the indenture of assignment of the 10th of September, 1839. It is admitted that this assignment was voluntary, and that the memorandum of the 21st December, 1839, has not in that respect altered the character of the transaction; and the Defendant, Mrs. *Kettlewell*, insists that she is not bound by it, or by the memorandum, and she claims the fund in the hand of the trustees.

(a) Amb. 394.

(d) 1 Atk. 280.

(g) 2 Sim. 133.

(h) 1 Keen. 551.

(b) 2 P. Wms. 182.

(e) 1 Ves. 409.

(h) 5 Sim. 524.

(k) 5 Sim. 69.

(c) 3 P. Wms. 132.

(f) 3 Mer. 667.

(i) 1 Myl. & K. 632.

(m) 5 Sim. 234.

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In support of the Plaintiff's claim, I was referred to the well-known principle recognised and established by the cases of *Colman v. Sarel* (a), *Ellison v. Ellison* (b), and *Pulvertoft v. Pulvertoft* (c), that where a trust is actually created in favour of a volunteer, a Court of Equity will enforce its execution, although it will not lend its aid to enforce a voluntary agreement. And according to Lord Eldon's decision in *Ex parte Pye* and *Ex parte Dubost* (d), a party may so constitute himself a trustee [*470] that a Court of Equity will execute the trust in favour of a volunteer. "It is clear," (says Lord Eldon in that case), "that this Court will not assist a volunteer; yet, if the act is completed, though voluntary, the Court will act upon it. It has been decided, that upon an agreement to transfer stock, this Court will not interpose; but if the party has declared himself to be the trustee of that stock, it becomes the property of the cestui que trust without more, and the Court will act upon it."

If the limits of the law were to be collected from the facts of the cases I have referred to, they would not perhaps go further than to establish, that where the legal interest in property is transferred or acquired in pursuance and in execution of an antecedent agreement or direction leading the uses or trusts of that property, or as part of the transaction creating the trust, the Court will execute the trust though voluntary. There does not, however, appear to be any reason why the doctrine of the Court should be so confined, provided the trust is actually created, and the relation of trustee and cestui que trust established between the parties. The language of Lord Eldon in the passage I have cited is not so limited; and from the late cases of *Wheatley v. Purr* (e), and *Collinson v. Patrick* (f), I conclude that Lord Langdale takes a similar view of the subject. The question, I conceive, must be simply this, whether the relation of trustee and cestui que trust has been actually established or not.

(a) 3 Bro. C. C. 12; S. C. 1 Ves. jan. 50.

(b) 6 Ves. 558.

(c) 18 Ves. 84.

(d) 18 Ves. 149.

(e) 1 Keen, 551. See note 1. of this case at page 558, 559, 560.

(f) 2 Keen, 123.

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In the case of a formal declaration of trust by the legal or even beneficial owner of property, declaring himself in terms [*471] the trustee of that property for a *volunteer, many considerations might arise which do not apply to the case now before me. The Court in that case might not be bound to look beyond the mere declaration. If the owner of property having the legal interest in himself were to execute an instrument by which he declared himself a trustee for another, and had disclosed that instrument to the cestui que trust, and afterwards acted upon it, that might perhaps be sufficient; for a Court of Equity, adverting to what Lord Eldon said in *Ex parte Dubost*, might not be bound to inquire further into an equitable title so established in evidence. Again, if the equitable owner of property, the legal interest of which was in a trustee, should execute a voluntary assignment of the property, and authorize the assignee to sue for and recover the property from that trustee, and the assignee should give notice thereof to the trustee, and the trustee should accept the notice and act upon it, by paying the dividends or interest of the trust property to the assignee during the life of the assignor and with his consent, it might be difficult for the executor or administrator of the assignor afterwards to contend that the gift of the property was not perfect in equity. But such circumstances do not occur in the present case. There is here no formal declaration of trust. This is the case of a voluntary assignment of which the trustees never had notice, and which was never acted upon; and the question is, simply, whether the facts which have been established, as against Mrs. *Kettlewell*, have constituted the relation of trustee and cestui que trust between the Plaintiff and the trustees of the fund, or produced the same effect by having estopped her from saying that such is not the case? Whether by the effect of the voluntary assignment of the 10th of September, 1839, and the memorandum, the beneficial interest in any part of the fund in question became in equity the property of the Plaintiff?

[*472] *Finding the doctrine of the Court clearly defined, that where a trust is actually created, the Court will act upon it in favour of a volunteer, and that a person may constitute him-

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self a trustee for another, it might perhaps have reasonably been expected, that where the beneficial owner of a fund had done that which unequivocally amounted to a declaration on his part, that an interest in his property should thereby become vested in another,—and the person in whom the legal interest was, and also the intended cestui que trust, had notice of that declaration, the Court would, as against the party making the declaration, have fastened upon it, and held that he had thereby actually created that trust, which, in the case of volunteers, the rule of the Court requires and acts upon. It is, however, impossible to say that the reported cases support such a proposition. Without referring to the cases in which parties have ineffectually endeavoured to convert an imperfect gift into a trust, the case of *Edwards v. Jones* (a) shews, that the most clear intention to confer an interest by a present act may not be sufficient to create a trust in favour of a volunteer, although made by the party in whom the legal interest may be, and communicated by that party to the intended cestui que trust. In that case the obligee in a bond made an indorsement upon it which purported in terms to be an actual assignment, and at the same time delivered the bond to the intended assignee. The *Vice-Chancellor*, and afterwards Lord *Cottenham*, on appeal, held this to be an imperfect gift, and not a trust. It was decided, that the relation of trustee and cestui que trust was not created by the transaction. I consider myself bound by the authority of that case in the absence of a formal declaration of trust, (whatever the effect of such a declaration might be), to hold, that the question, whether a trust has been created or not, must be determined upon principles of strict law, [*473] and not merely from circumstances which may fail to place the intention of the parties out of the reach of controversy. The most distinct evidence of intention to pass an interest may not be conclusive.

It was said for the Plaintiff in this case, that the legal interest being in the executors and trustees under the testator's will, the assignment of 10th September, 1839, under seal, would create a

(a) 1 Myl. & Cr. 226.

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trust, and that the case of bond, as in *Edwards v. Jones*, was distinguishable from the present. I confess myself unable to discover the ground for any judicial distinction between the cases, where the question is only whether a trust has been actually created. If, in the case now before me, Mrs. *Kettlewell* had assigned her interest in the property for value after her daughter's death, and notice of such assignment had been given to the trustees of the fund, before they had notice of the assignment under which the Plaintiff claims, it would have been impossible not to hold that the assignment for value had prevailed over the earlier voluntary assignment. This would have been the case even if the first assignment had been for value (a). But this consequence would not necessarily have followed if the trust was actually created, provided the legal interest were not transferred to the assignee for value without notice of the prior trust. For personal property is not within the statute (b), *Bill v. Cureton* (c), *Jones v. Croucher* (d); and if the trust was once created, the property would belong to the cestui [*474] que trust without more, and no purchaser with notice of his right could call for the transfer of the legal interest. The cases I have referred to clearly establish this. My conclusion therefore is, that the relation of trustee and cestui que trust has not been established in this case, unless such an effect is to be attributed to the particular nature of the indenture of the 10th September, 1839, as being in form a legal assignment.

Now, upon this part of the question, I observe, that the case of *Edwards v. Jones* is a direct authority that, in such a case, a writing not under seal will not create a trust, however clear the intention of the assignor may be. If, then, the voluntary assignment of the 10th of September, 1839, has given the Plaintiff a title to the fund in question, it must be upon the ground that a deed under seal, though voluntary, is binding in equity by way of estoppel upon the party who makes it, as between himself and his assignee, although a writing not under seal would not have that effect. A decision

(a) *Dearle v. Hall*, 3 Russ. 1; *Loveridge v. Cooper*, Id. 30; *Foster v. Blackstone*, 1 Myl. & K. 297; S. C. 9 Bligh, N. S. 332. See *Meux v. Bell*, ante, p. 73.

(b) 27 Eliz. c. 4; 30 Eliz. c. 18, s. 3.

(c) 2 Myl. & K. 503.

(d) 1 Sim. & St. 315.

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founded upon this distinction would give an effect to an instrument under seal, as distinguishable from an equally clear intention expressed in a writing not under seal, beyond what I believe a Court of Equity has ever allowed to it. The case of *Colman v. Sarel*, as reported in *Brown*, and explained in the subsequent cases, is a direct authority that, for the purposes of a case like this, an assignment under seal of that which does not pass at law by the operation of the assignment itself stands upon no better ground than a covenant or agreement to assign. I think the case of *Holloway v. Headington (a)* is an authority for the same proposition; and, unless my experience at the bar entirely misleads me, the learned Judge, by whom the latter case was decided, has always held, that a voluntary assignment in a legal form, unac- [*475]
 companied by any other acts, is not to be regarded as effectual to pass an equitable interest. The great experience of that learned Judge, as a conveyancer, gives peculiar value to his opinion upon such a subject.

The present case is much less favourable to the Plaintiff than many of the cases in which claims similar to the present have been rejected; for, in this case, *Mrs. Kettlewell*, at the time of the assignment, had nothing but an expectancy in the fund in question (like that of an heir in the lifetime of the ancestor); and the cases cited at the bar shew that, with respect to such mere expectancies, a deed, unless founded upon value, will not necessarily operate by way of estoppel.

It was said, that, if, in this case, I should come to the conclusion, that the Plaintiff has failed to make out a title to the relief he prays, I should, in effect, decide that which was inconsistent with the judgment of Sir *William Grant* in *Sloane v. Cadogan*. If such be the effect of my judgment, (I think, however, it is not), I must shelter myself under the authority of Lord *Thurlow* in *Colman v. Sarel*.—the repeated approbation of that case by Lord *Eldon*,—the disapprobation of *Sloane v. Cadogan* manifestly expressed by Sir *Edward Sugden* in the latest edition of his work (a),—the dif-

(a) 5 Sim. 324.

(b) Tr. on Vend. & Pur. Vol. 3, 297, ed. 10.

 1842.—Hughes v. Stubbs.

ficulty which in *Edwards v. Jones*, Lord *Cottenham* obviously felt, in reconciling *Sloane v. Cadogan* with the other cases upon the authority of which he decided the former case,—and the opinion of the *Vice-Chancellor of England*, which I collect from *Holloway v. Headington*, as well as my belief that that learned Judge does not consider a voluntary assignment alone as of any greater effect in equity than a mere agreement.

[*476] *The late case of *Dillon v. Coppin* (a) does not impugn the previous cases. In deciding against the Plaintiff, I do not mean to express any opinion as to what the effect of a formal declaration of trust, or of the assignment in this case would have been, if Mrs. *Kettlewell*, at the time of executing it, had had more than a mere expectancy, and if, in addition to the facts which here took place, notice of the assignment had been given to the trustees of the fund, and accepted by them. I decide only that a voluntary assignment of a mere expectancy, not communicated to those in whom the legal interest is, does not create a trust in equity within the principle of the cases relied upon by the Plaintiff.

Dismiss the bill without costs.

HUGHES v. STUBBS.

July 9 and 12, 1842.

The testatrix drew a cheque on her bankers for 150*l.* in favour of *A.*, and she verbally directed *A.* to apply that sum, or so much of it as might be necessary to make up to a legatee the difference in value between a legacy of 100*l.*, which the testatrix, by her will, had given to the legatee, and the price of a 100*l.* share in a certain railway; the testatrix informing *A.* that she intended to give the share instead of the legacy, but she did not think it necessary to alter her will. The bankers gave credit to *A.* for the 150*l.* The testatrix afterwards died. In a suit for the administration of her estate :—*Held*, that no trust, in respect of the 150*l.*, was created for the benefit of the legatee.

THE testatrix, by her will, dated the 14th of November, 1838,

(a) Before Lord *Cottenham*. Not reported.

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gave to the Defendant, *Ellen Gelling*, a legacy of 100*l.* Under the decree in a legatees' suit, and in reference to the inquiries thereby directed, the Master found that the testatrix, some time before her decease, but after making her will, drew an order in writing upon Messrs. *Cropper, Benson, & Co.*, who acted as her bankers at *Liverpool*, for the sum of 150*l.*, in favour of the Defendant, *John Cropper*, and that the testatrix, at the same time, gave the said *John Cropper* verbal directions or instructions to apply the said sum, or so *much thereof as might be [*477] necessary to make up to the said *Ellen Gelling* the difference in value between the legacy of 100*l.*, given to her by the said will, and the price of one share of 100*l.* in the stock of the *London and Birmingham Railway Company*, at the time when such legacies might be or become payable, it being the intention of the testatrix, as she informed the said *John Cropper*, to give to the said *Ellen Gelling* such share, instead of the legacy of 100*l.*, although the testatrix did not think it necessary to alter her will for that purpose; and that, on such order being presented to the said Messrs. *Cropper, Benson, & Co.*, the said sum of 150*l.* was, in the lifetime of the testatrix, entered in their books to the debit of the testatrix as cash transferred from her account to the credit of the said *John Cropper*; and that the said *John Cropper*, pursuant to the said order, was duly credited in his account with the said Messrs. *Cropper, Benson, & Co.*, with the said sum of 150*l.*, but, inasmuch as there was not, at the time of making such entries, any balance of account as between the testatrix and the said Messrs. *Cropper, Benson, & Co.*, the said entry of the sum of 150*l.* to her debit caused her account to be overdrawn by that sum; and the Master found the value or market price of one share of 100*l.* in the stock of the *London and Birmingham Railway Company*, at the time that the legacy of 100*l.* became payable, and also at the time of making his report, and the said value or price at either time, considerably exceeded the amount of the legacy.

Mr. *Sharpe*, for the Defendant, *Ellen Gelling*, argued, that the

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effect of the transfer of the sum of 150*l.* to Mr. *Cropper*, as the trustee, and the accompanying declaration of the purposes of it, had been to create a trust in respect of that sum, or of such [*478] part thereof as was *required to make up the difference referred to in favour of the legatee. He cited *Wheatley v. Purr* (a); *Leche v. Lord Kilmorey* (b).

Mr. *Mylne*, for the Plaintiff.

It is apparent that there was no intention on the part of the testatrix to create a trust. If she designed the act to have any binding operation, it was, that it might take effect as a nuncupative will. If the effect insisted upon were given to the transaction, it would open a mode for evading the duty on legacies.

Mr. *Campbell*, and Mr. *Phillips*, for the executors, and for Mr. *Cropper*.

VICE-CHANCELLOR:—

The question is, whether the testatrix has so dealt with the sum of 150*l.* in question as to make it no longer her property, but the property of Mrs. *Gelling*. If a person intending to give property to another vests that property in trustees, and declares a trust upon it in favour of the object of his bounty, there are cases which establish that, by such acts, the gift is perfected, and the author of the trust loses all dominion over it: *Coleman v. Sarel* (c); *Ellison v. Ellison* (d); *Pulvertoft v. Pulvertoft* (e); *Ex parte Pye, Ex parte Dubost* (f). The principle has been extended to cases in which the author of the gift has had the legal dominion over the property remaining in him, but has completely declared himself to be a trustee of that property for the object indicated: [*479] *Ex parte Pye; Ex parte Dubost*. But it is clear, also, that a person not intending to give or to part with the dominion over his property, may retain such dominion, notwithstanding

(a) 1 Keen, 551.

(b) T. & R. 207.

(c) 3 Bro. C. C. 12; S. C. 1 Ves. jun. 50.

(d) 6 Ves. 656.

(e) 18 Ves. 84.

(f) 18 Ves. 140.

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ing he may have vested the property in trustees, and have declared a trust upon it in favour of third persons: *Walwyn v. Coutts* (a); *Garrard v. Lord Lauderdale* (b); *Acton v. Woodgate* (c); *Gaskell v. Gaskell* (d).

The different effects thus given by Courts of Equity to transactions similar in form, necessarily give rise, in some cases, to questions of considerable difficulty. But the distinction which has been taken between the two classes of cases is founded in reason and good sense, and however refined that distinction may in some instances appear, I do not entertain a doubt but that Courts of Equity will continue to maintain it. "The distinction," (as Lord *Cottenham* observed in *Bill v. Cureton* (e), speaking of trusts for the payment of debts), "is adopted to promote the views and intentions of the parties. A man who, without communication with his creditors, puts property into the hands of trustees for the purpose of paying his debts, proposes only a benefit to himself by the payment of his debts—his object is not to benefit his Creditors. It would therefore be a result most remote from the contemplation of the debtor, if it should be held that any creditor, discovering the transaction, should be able to fasten upon the property and invest himself with the character of a cestui que trust."

The result of the cases is, that the Court looks into the nature of the transaction, and determines from the nature of the transaction what the effect of it shall be in divesting the owner of the property to which it relates. The question which in [*480] the present case I have to solve is, whether, by force of the transaction upon which Mrs. *Gelling* relies, she acquired during the life of the testatrix an equitable interest in the money in the hands of *Cropper, Benson, & Co.*; and whether the testatrix in her lifetime was deprived of her original property in, and dominion over, that money, to the extent of the interest so acquired by Mrs. *Gelling*? or, in other words, whether, if the testatrix had changed her intention respecting the legatee, and had called upon *Cropper, Ben-*

(a) 3 Sim. 14.

(b) 8 Sim. 1; S. C. 2 B. & M. 481.

(c) 2 M. & K. 492.

(d) 2 You. & J. 502.

(e) 2 Myl. & K. 511.

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son, & Co., and *John Cropper*, to pay the money to her, the testatrix,—Mrs. *Gelling* could in that case, having discovered the transaction, have maintained a bill to have the money brought into Court, and secured for her benefit during the lifetime of the testatrix, until it should appear whether the testatrix had, by the legacy in her will, given Mrs. *Gelling* an interest not less beneficial than that which the testatrix intimated her intention to give? or whether the transaction in question was any other than a private arrangement of the testatrix for her own convenience, with an agent constituted by herself, and that agent a trustee for herself and not for Mrs. *Gelling*?

I cannot bring myself to doubt as to the conclusion to which I ought to come upon such a question. There was no antecedent agreement with, or promise to, Mrs. *Gelling*, leading to the conclusion that the testatrix by placing the money in the hands of *Cropper, Benson, & Co.*, to the credit of *John Cropper*, was perfecting or performing such antecedent agreement or promise. There does not appear to have been any subsequent communication of the facts in the lifetime of the testatrix, from which the Court might have drawn the same conclusion as from an antecedent agreement or promise:

and although an antecedent agreement or promise, or a
[*481] subsequent communication, may not be necessary to the completion of a voluntary trust, the absence of such circumstances leaves me nothing but the transaction itself from which to draw a conclusion.

It would be sufficient in this case to say, that there is nothing in the transaction which necessarily implies that the testatrix (intending only a benefit to take effect after her death, and in connexion with her will) meant to place this disposition of her property out of her control in her lifetime. But the transaction, to say the very least of it, is capable of a construction unfavourable to the claim of Mrs. *Gelling*; and I think the true inference from it is opposed to that claim. I am of opinion that the proper inference to be drawn from it is, that the testatrix intended the arrangement to supply the place of an alteration in her will, and to stand upon the same footing as a will. All the observations of Lord *Cottenham* in *Bill v. Cureton* appear to me to apply to a case like the present.

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It was said that if I came to this conclusion, I should overrule the case of *Wheatley v. Purr*. But that case may stand upon different grounds. It will be seen from the evidence (a), that the intention there was to give a present interest to the objects of bounty; directions were given accordingly, and the mode of carrying it into effect was adopted by agreement between the parties. In that respect, *Wheatley v. Purr* resembles *Ex parte Pye*, *Ex parte Dubost*, where instructions having been given to buy stock in the name of another person, the party purchased it in the name of the donor, and Lord *Eldon* thought the circumstances were enough to constitute the original owner a trustee. I should be greatly surprising the party if I were to hold, that by merely placing money in the hands of *Cropper, Benson, & Co.* to the credit of *John* [*482] *Cropper*, in order that the latter should apply it in a certain manner in connexion with her will, she had conferred on Mrs *Gelling* a present interest in the money, excluding herself, and entitling Mrs. *Gelling* to have the money secured for her. The cases on this subject are necessarily of difficulty, but the conclusion to which I feel bound to come is, that the testatrix did not part with her property in the sum in question, or create any trust for the legatee.

 BOND v. GRAHAM.

May, 27, 30.

To a suit in respect of an unadministered part of a testator's estate, which has been remitted from India, and remains in the hands of an executor residing in England, but who was only constituted executor of the testator in India,—against such executor, a personal representative constituted in England is a necessary party.

C. BROWN, a testator residing in India, and who died there, by his will gave the residue of his personal estate to the Plaintiff, and appointed three persons, *Cartwright*, *Graham*, and *Morine*, executors, all of whom were in India. *Cartwright* and *Graham* proved

(a) See 1 Keen, 558.

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the will in India, and both of them acted in the trusts of it in that country. *Morine* renounced. In December, 1838, *Graham* accounted with *Cartwright* in respect of his receipts and payments as executor, and paid over to the latter the balance owing to the estate of the testator upon that account, and returned to England. In 1840, *Cartwright* remitted to *Graham*, in England, the sum of 181,000 rupees, being part of the testator's estate; and, soon after making this remittance, *Cartwright* died in India. The bill prayed (a), that *Graham* might be ordered to account for and pay to the Plaintiff the sum remitted to him from India.

[*488] At the hearing, Mr. *Ellison*, for the Defendant, **Graham*, objected, that the suit could not proceed in the absence of a personal representative of the testator constituted in England, and cited *Twyford v. Trail* (b), *Lowry v. Fulton* (c), *Tyler v. Bell* (d). As executor, the Defendant cannot be discharged from all future liability to creditors and legatees, unless the estate is properly represented.

Mr. *Teed*, and Mr. *Stinton*, for the Plaintiff.

The absence of a personal representative, constituted in England, is no objection to the suit, nor would the Defendant be more effectually discharged by the existence of such a representative; for, first, the Defendant is in fact executor, and, in that capacity, he is, at least, empowered to administer the estate in his hands, and to take the proper acquittance and discharge from the claimants upon it. Secondly, the Defendant may also be sued alone, as the agent of *Cartwright*, and deputed by him to pay over the clear and specific fund in question to the parties entitled to it. Thirdly, he has, by receiving the sum remitted from India, taken upon himself the office of trustee of that fund, and is bound to perform the trust.

(a) The prayer was in fact more extensive, seeking an account of the estate come to the hands of *Graham*, but it was at the bar limited to the relief above stated, and treated as asking nothing further,—no objection of form being taken.

(b) 7 Sim. 92.

(c) 9 Sim. 104.

(d) 2 Myl. & Cr. 89.

1842.—Bond v. Graham.

It is a virtual assent to the bequest by both executors, and the character of the fund is changed: *Smith v. Brooksbank* (a). Fourthly, taking it as a fund yet remaining unadministered, the Court will not attend to the objection, when made by the person whose duty it was to vest himself with the full character of representative of his testator, and thereby place himself in that situation in which he might be called upon to answer any claims which should be made upon the estate in his hands: *Logan v. Fairlie* (b).

*Mr. Cooper, and Mr. Briggs, for other parties interested in the estate. [*484]

VICE-CHANCELLOR :—

I have no doubt on the point, as a question of regular practice, that a personal representative of the testator constituted in this country, ought to be a party to the suit. If an executor or administrator has so dealt with a fund, that by reason of such dealing it has ceased to bear the character of a legacy or share of a residue, and has assumed the character of a trust-fund, in a sense different from that in which the executor or administrator held it,—if it has been taken out of the estate of the testator, and appropriated to, or made the property of, the cestui que trust, it may not be necessary that the cestui que trust should bring before the Court the personal representative of the testator in a suit to recover that part of the estate. But if the character of the property is unaltered, and it still remains part of the testator's estate, I have always understood the rule of the Court to be, that the will which the Court is required to recognise as the act of the testator should be authenticated in a particular manner—namely, by probate in the Ecclesiastical Courts of this country: *Tyler v. Bell* (c).

The question then is, whether this fund has ceased to bear the character of residue of an estate unadministered, and has assumed

(a) 7 Sim. 18

(b) 1 Myl. & Cr. 59.

(c) 2 Myl. & Cr. 39, and cases there cited; *Twyford v. Trail*, 7 Sim. 92.

 1842.—Hughes v. Eades.

the new character of a trust-fund, unconnected with the estate of the testator. The fund is in the hands of the surviving executor who proved the will in India. This, though of course not [*485] *conclusive (a), yet renders the proof of that alteration in the nature of the property for which the Plaintiff contends more difficult, than if it had passed from the hands of the executor of the testator into new hands. The Defendant, the executor, insists that he holds the fund as executor, and the question is therefore reduced to this—whether, on the pleadings, the Plaintiff can shew that the property has been altered, and that the Defendant is precluded from taking that objection? Under the circumstances of this case, the question must be determined by the representation of the facts which the Defendant has given in his answer.

[His Honor read several passages from the answer, to the effect that both the Defendant and the deceased executor, *Cartwright*, had acted in the trusts of the will, and shewing that the Defendant, as well as the estate of *Cartwright*, was still accountable].

Upon this answer, it is impossible to say that the Defendant holds the fund as trustee and not as executor; and however I may regret the delay which will be occasioned, I can only direct the cause to stand over, in order that the necessary probate or administration may be taken out. Under the circumstances, the costs up to the hearing may be costs in the cause.

[*486]

HUGHES v. EADES.

1842: May 25, 26.

Decree for account in a creditor's suit, seeking to charge the real and personal estate of the testator, where the debt of the Plaintiff was admitted by the executors and trustees, and by such of the parties beneficially entitled as were *sui juris*; but one Defendant was a married woman, and another an infant, and there was no evidence of the debt, except the admission.

Two of the Defendants were alleged, and in like manner admitted, to be out of the jurisdiction; but the fact was not proved: liberty was given, under the decree, to exhibit interrogatories for that purpose.

- THE Plaintiff was a creditor of the testator proceeding both against

(a) See *Phillippo v. Munnings*, 2 My. & C. 309.

1842.—*Hughes v. Eades*.

his real and personal estate. The Defendants were the executors and trustees and devisees of the real estate. Two of the parties entitled in remainder were stated to be out of the jurisdiction. The debt and the fact that the parties were out of the jurisdiction were admitted by the executors and trustees, and all the devisees who were *sui juris* and before the Court. The same facts were also admitted in the answer of one of the Defendants, who was a married woman. Another Defendant was an infant. No evidence was given in proof of the debt, or of the absence of the other parties, as against the infant or the married woman.

Mr. *Koe*, for the Plaintiff.

Mr. *Kenyon Parker*, Mr. *Wright*, Mr. *Jeremy*, and Mr. *Craig*, for the several Defendants.

The questions discussed were, whether, in the absence of proof of the debt, as against the infant, and the adult Defendant not *sui juris*, any decree could be made? Or, whether the cause ought not to be ordered to stand over to enable the Plaintiff to perfect his case, he paying the costs of the day? Or, if any decree were made, whether it ought not to be confined to the personal estate, to which the admission of the executors extended, dismissing the bill against the other parties? Or, whether the full decree sought might not be made, giving the Plaintiff liberty to supply before the Master the defective proof of the fact that some Defendants were out of the jurisdiction, as it would be necessary, according to the regular *practice, that he should again prove his debt in the [*487] Master's office? The authorities referred to are mentioned in the judgment(a).

VICE-CHANCELLOR:—

There is no doubt that the admissions in this case afford sufficient evidence on which to found the decree as against the personal estate;

(a) See also *Studd v. Burditt*, C. P., Cooper's Select Cases, p. 473.

 1842.—Hughes v. Eades.

for the executors admit the debt ; and as the debt must be proved again in the Master's office, *prima facie* evidence is, in the first place, sufficient (a). The question is with regard to the suit, so far as it seeks to affect the real estate. Now, the debt is admitted by the widow of the testator, and the other devisees who are *sui juris*, but there is nothing which can be taken as proof against the married woman and the infant. The Plaintiff's case is, therefore defective ; and the question is, whether I am simply to dismiss the bill as against those parties, or give the Plaintiff the indulgence of proving his debt in this suit. I was referred to *Marten v. Whichelo* (b) as an authority that I ought to adopt the former alternative ; but, in that case, there was no proof against any party that the debt was due ; and Lord *Cottenham* said, his impression was, that where the Plaintiff gave no evidence on the point upon which his whole case depended, he would not, at the hearing, be allowed to prove it ; and after reference to the authorities, he said, that the Court had exercised a wide discretion in giving or refusing leave to supply the defect of evidence, in doing which the merits of the case, upon the Plaintiff's own shewing, ought to have a leading influence. In [*488] some cases, the Court has granted the indulgence : *Seton on Decrees* (c) ; *Hood v. Pimm* (d) ; *Cox v. Allingham* (e). In the present case, I think I am justified in giving the Plaintiff leave to perfect his case by proving the debt, inasmuch as that debt is admitted by all the parties who are before the Court, and are *sui juris*.

The Plaintiff alleges, that two of the parties are out of the jurisdiction ; but there is no evidence of that fact, which ought to be proved in the regular manner. In some cases, the cause has been directed to stand over, suspending the whole decree, but giving leave to exhibit an interrogatory before the examiner. In other cases, in order that the taking of an account might not be delayed, the account has been directed with leave to exhibit an interrogatory in the meantime. A third course has been to refer it to the Master, to enquire whether the fact is so or not, in cases where

(a) See ante, p. 248 ; and cases there cited.

(b) 1 Cr. & Ph. 1257.

(c) Page 364.

(d) 4 Sim. 101.

(e) Jac. 337.

 1842.—Hughes v. Eades.

that mode of proceeding has not been objected to. But, as the Plaintiff in this case must prove his debt, the obviously convenient course is to give him also, under the decree, the opportunity of proving that the parties are out of the jurisdiction.

The Plaintiff ought to have gone into evidence on this part of his case before he brought the cause to a hearing. In *Egginton v. Burton* (a), I decided according to what *I [*489] believe is the regular practice, and directed the cause to stand over, giving liberty to exhibit interrogatories to prove the fact that the absent parties were out of the jurisdiction. I followed the opinion of Sir John Leach, in *Quatock v. Bullen* (b), and Lord Langdale in *Dibbs v. Goren* (c); and the course taken by the Vice-Chancellor in *Hood v. Pimm*. To that course, in ordinary cases, I shall adhere, until my view of the practice is overruled by higher authority.

THIS Court doth order that the Plaintiff be at liberty to exhibit an interrogatory or interrogatories to prove his debt in the pleadings mentioned, and also to prove that the Defendants, *W. B.* and *M.* his wife, and *G. M.* and *E.*, his wife, are now out of the jurisdiction of this Court; and, it being alleged that a decree has been made in a cause, *Eades v. Harris*, to take the accounts relating to the estates in question in this cause,—subject to such proof of debt, and of parties being out of the jurisdiction, —This Court doth order and decree that it be referred to the Master to whom the said cause, *Eades v. Harris*, is referred, to take an account of what is due to the Plaintiff, and all other the creditors of the said testator, *John Eades*, &c. Usual di-

(a) Bill by a creditor against the trustees under a deed of trust for the payment of debts, charging the debtor and author of the trust was out of the jurisdiction. The trustees admitted that fact, but there was no other evidence of it. *Mr. Anderson* and *Mr. Jeremy* said that the accounts might be directed to be taken contingently upon the finding of the Master, that the party was out of the jurisdiction. *Smith v. Hibernian Mine Company*, 1 Sch. & Lef. 238; *Buller v. Borton*, 5 Madd. 42; *Edney v. Jewell*, 6 Madd. 165. *Mr. James Russell* contra. The Vice-Chancellor directed the cause to stand over, and gave the plaintiff liberty to exhibit interrogatories to prove that the party was out of the jurisdiction. His Honor said that the Court would not decree an account against a trustee, in the absence of a party beneficially interested, except upon proof that the latter was not within the jurisdiction. *EGGINTON v. BURTON*.—Jan. 29, 1842.

(b) 5 Man. 81.

(c) 1 Beav. 457.

 1842.—*Darby v. Smale*.

rections. And it is ordered that the said Master do also take an account of the personal estate and effects of the said testator, come to the hands of the Defendant *M. E.*, his executrix, &c. Inquiry of outstanding personal estate. Liberty to adopt the accounts directed in *Eades v. Harris*, so far as they relate to the personal estate. Directions for application of personal estate in due course of administration. Inquiry, whether any part of the property comprised in the deeds, dated &c., in the pleadings mentioned, is part of the said testator's real estate, and passed thereby. And, for the better taking &c.,—usual directions. Further directions and costs reserved until after report. Liberty to apply.

[*490]

*DARBY v. SMALE.

1842 : July 11 and 13.

A Plaintiff, who upon a motion to dismiss his bill for want of prosecution, has undertaken to speed the cause, according to the terms of the 16th Order of 1831, is not bound to file a replication within three weeks from the date of his undertaking, if he does not require a commission to examine witnesses.

THIS was a motion by the Defendant to dismiss the bill under the following circumstances :—

The answer was filed on the 10th of January, 1842. No replication having been filed, on the 2nd of June the Defendant moved to dismiss the bill for want of prosecution. The Plaintiff appeared upon the motion, and gave the usual undertaking to speed the cause (a). No replication having yet been filed, the Defendant, on the 27th of June, served the Plaintiff with notice of another motion for the 7th of July, to dismiss the bill. On the 6th of July, the Plaintiff filed his replication.

Mr. *Speed*, for the motion.—The Plaintiff has not acted upon the undertaking which he has given, and he cannot, therefore, have the benefit of it by postponing the dismissal of the bill: *Allen v. Willes* (b). Moreover, upwards of three weeks were suffered to elapse

(a) The terms of the undertaking, required by the Order XVI. of 1831, are, that the Plaintiff shall "file a replication, and serve a subpoena to rejoin; and, in case he requires a commission to examine witnesses, shall obtain and serve an order for such commission, within three weeks from the date of such undertaking."

(b) 3 Sim. 274.

 1842.—*Darby v. Smale*.

from the date of the undertaking, and, within that time by analogy at least, the Plaintiff was bound to file the replication and serve the subpoena to rejoin: *Padmore v. Bodfield* (a). The act of filing the replication, after service of the notice of motion, does not affect the case: *Attorney-General v. Cooper* (b).

*Mr. *Thomas Parker*, for the Plaintiff.—The case of [*491] *Allen v. Willes* was decided upon the word “forthwith” in the Order XVI. of 1828, which was omitted in the Order amended in 1831. The obligation to file the replication within three weeks, only arises where the Plaintiff requires a commission to examine witnesses. The Plaintiff, in this case, requires no commission, and the case depends on the old practice; and by the old practice, if a replication was not filed in the next term, it was open to the Defendant to move again to dismiss, which put the Plaintiff on the peremptory undertaking: *Williams v. Janaway* (c); *Daniell v. Austen* (d); *Whalley v. Pepper* (e).

Mr. *Speed* in reply.

The old practice has no application to this case, for formerly the undertaking to speed was not given until after replication. If the Plaintiff is not bound to file his replication within any definite time, the order made upon his undertaking is nugatory.

THE VICE-CHANCELLOR:—

It appeared to me, on the first consideration of this case, that it was scarcely reasonable to construe the Order in such a manner as to give to a Plaintiff, who does not require a commission, a greater time for filing his replication than is given, by the Order, to a Plaintiff who does require a commission. But, upon examining the cases which have been decided upon the 17th Order of 1831, the language of which cannot, in this respect, be distinguished from that of the 16th Order, I find it has been held, that the 17th Order, and the restriction of *time to three weeks, do [*492] not apply, except in cases where the Plaintiff requires a

(a) 1 Beav. 367.

(b) C. P. Cooper's Select Cases in Chan. p. 415.

(c) 6 Sim. 77.

(d) 8 Sim. 19.

(e) Id. 203.

 1842.—Barton v. Pyne.

commission. The case of *Williams v. Janaway*, to this effect, was followed by Lord Cottenham in *Smith v. Oliver (a)*, and in *Crooke v. Trery (b)* expressing, in the latter case, his concurrence with the *Vice-Chancellor*. The same case was followed by Lord Langdale, although, in some measure, against his own opinion, in *White v. Smith (c)*.

This construction, no doubt, gives the larger time for the least complicated proceedings; but it proceeds on the consideration, that the three weeks allowed for the steps to be taken antecedent to a commission, cannot have reference to steps which are taken without any view to a commission. In *Daniell v. Austen*, although the replication was filed, the subpoena to rejoin was not served within the three weeks; and the *Vice-Chancellor* held, that the time to be allowed for such service was to be according to the old practice (*d*).

It was said, that to adopt such a construction of the Order as would compel me to refuse the present motion, would be to render the Order ineffectual; but that I do not consider a necessary consequence of my view of the Order.

The motion must be refused; but, as the notice of motion was given before replication, the Plaintiff must pay the costs of the motion.

 [*498]

*BARTON v. PYNE.

1842: March 9, 12.

In a suit against a solicitor for an account, in the taking of which the bills of costs of the defendant are taxed, and reduced more than one sixth in amount, the Court has jurisdiction to give or withhold the costs of taxation, according to the circumstances and justice of the case.

THE Plaintiff, as the administratrix of *Peter Cochrane*, the intestate, filed her bill against the Defendants *W. Pyne* and *H. Richards*, solicitors in partnership, praying that an account might be taken of

(a) 3 My. & C. 165.

(b) Id. 168.

(c) 1 Keen, 381.

(d) 2 Dan. Ch. Pr. 376, n; C. P. Cooper's Select Cases, p. 416.

1842.—Barton v. Pyne.

the dealings and transactions between them and the intestate ; and that the Defendants might be decreed to pay what should be found due from them on the said account, the Plaintiff offering, in case any thing should be found due from her, to come to an account with them of the assets of the intestate, and to apply such assets as remained to be administered in discharge thereof ; and that, in order to the just taking of the account, the bills of costs of the Defendants against the intestate might be taxed ; and that proper enquiries might be made, whether any, and if any, what parts of the costs were incurred without due authority, or otherwise improperly ; and that the Defendants might be decreed to deliver up the deeds, writings, and papers of the intestate, and also three chests containing plate belonging to the intestate, which had been deposited by him in the custody of the Defendants. The Defendants, by their answer, claimed the sum of 95*l.* 8*s.* 1*d.*, as due to them from the intestate, in respect of their bills of costs ; and the Defendant *W. Pyne*, by his answer, claimed a balance of 121*l.* 9*s.* 5*d.*, and interest thereon, in respect of his receipts and payments on account of the intestate. The Defendants stated that the intestate had agreed that they should retain the three chests of plate as security for the sum then due from the intestate on the above account, and for their said costs ; that they had at all times been willing and offered to deliver up to the Plaintiff the papers of the [*494] intestate and the chests of plate, upon a written undertaking being given by the Plaintiff to pay what should be found due to them ; and they submitted to have the accounts taken, and the bills of costs taxed, upon the Plaintiff being held bound to pay the same ; and they submitted that the suit was unnecessary, and that the costs ought to be paid by the Plaintiff. The decree was made in December, 1839 ; and directed an account to be taken of all dealings and transactions between the Defendants or either of them and the intestate, and of all receipts and payments by them, as agents or solicitors of the intestate ; and directed the Defendants to carry in their bills of costs, and that the same should be taxed as between solicitor and client. Enquiries were also directed concerning the deposit of the chest of plate. By the report in November,

1842.—Barton v. Pyne.

1841, it was found that a sum of 1096*l.* 18*s.* 3*d.* was due from the estates of the intestate to the Defendant *W. Pyne*; and that the bills of costs of the Defendants, amounting altogether to the sum of 1160*l.* 18*s.* 2*d.*, had been taxed as between solicitor and client at the sum of 953*l.* 0*s.* 10*d.*, and deducting therefrom the sum of 175*l.* 12*s.* 0*d.* received by the Defendants in respect of their costs, the same was reduced to 777*l.* 8*s.* 10*d.*, which were found due to the Defendants in respect of such bills of costs. And that in May, 1835, the intestate deposited and sent the said three chests, containing, as the Defendants believed, plate and articles of value, to the office of the Defendants, for, and on account of the intestate, which chests were severally locked up and sealed and had ever since been in the same state and condition as when deposited; and that the Defendants claimed to hold the same as a security for the amount due to them from the intestate. The cause came on for further directions.

Mr. *J. Russell*, and Mr. *Bush*, for the Plaintiff.

"The costs of the taxation of the bills of costs must be [*495] borne by the Defendants according to the rule laid down by the statute (a), and followed in this Court; *Shields v. Molyneux* (b); *Paget v. Nicholson* (c); *Ramsden v. Hilton* (d) (e); *Silvertop v. Ramsey* (e). The offer made by the answer to deliver up the property on payment of the amount claimed, does not affect the case, for the taxation has proved that the amount claimed was excessive; and if that had not been so the Plaintiff would still have been entitled to the account and taxation. *Collyer v. Dudley* (f).

Mr. *Sharpe*, and Mr. *Toller*, for the Defendants.

The case is wholly distinct from those in which the payment of the costs of taxation depends on the proportion which is allowed. If a

(a) 2 Geo. 2, c. 23, s. 23; 30 Geo. 2, c. 19, s. 75.

(b) Beames on Costs, ed. 2, p. 197.

(c) Id. Appendix, p. 240.

(d) 1 Dick. 322, Beames on Costs, ed. 2, p. 199.

(e) 1 Beav. 434.

(f) T. & R. 431.

 1842.—Barton v. Pyne.

plaintiff in a cause obtains a decree with costs, and his solicitor carries in a bill which is reduced on taxation to a fourth part of its original amount; yet, neither the plaintiff nor his solicitor are therefore ordered to pay the costs of taxation. The taxation in this suit stands on the same ground; it is a taxation between adverse parties: *Murray v. Barley* (a). Another feature which distinguishes this case from those within the rule referred to is, that the present Plaintiff does not give her personal undertaking to pay what should be found due,—a benefit given to the solicitor, in consideration of the summary proceeding to which he is subjected.

VICE-CHANCELLOR, after saying, with respect to the "chest of plate, that the mere possession of property independent of contract could not give the Defendants the right to retain it as a security for their debt; and that he was of opinion that no contract had been proved; and the property must, therefore, be given up to the Plaintiff, on her undertaking to account for the same as administratrix:—

The Court, by analogy to the rule which the statute lays down, throws upon the solicitor the costs of the taxation, where his bill is reduced by more than one sixth of the amount. The same rule has been adopted, and is commonly pursued in bankruptcy: *Ex parte Westall* (b); *Ex parte Barrett* (c). The Court does not owe its jurisdiction on this subject to the statute, but acts under the general authority which it possesses. In the case of *Bignol v. Bignol* (d), an order was obtained in the cause for the taxation of the solicitor's bill; and an application was made to discharge the order, on the ground that the Court had not jurisdiction to make it in the cause, and that the motion should have been *ex parte*; but Lord Eldon said, that the jurisdiction here and at law was much more ancient than the statute,—the Court subsequently applying the process

(a) 7 Sim. 164, and the cases at law there cited; *Spelman v. Woodbine*, 1 Cox, 49.

(b) 5 Ves. & B. 141.

(c) 3 Dea. & Chit. 731; S. C. 1 Mont. & Ayr. 447. (d) 11 Ves. 328.

 1842.—Bond v. Graham.

independent of the statute, but “generally pursuing the equity with regard to costs which is stated in the statute.” In *Yea v. Frere* (a), the benefit of the rule was given to the solicitor, where less than a sixth was taken off, although, in other respects, Lord *Eldon* considered him to have acted improperly; and in *Barr v. Wiggins* (b), the fact of proceeding to recover the amount of the taxed costs, before the costs of taxation were ascertained, where the bill was reduc-

ed upwards of a sixth, appears to have been *made the [*497] ground of an injunction against the solicitor, from which it must be inferred that the latter was considered liable

to pay the costs of taxation. In *Silvertop v. Ramsey*, Lord *Langdale* applied the same rule; but it does not appear whether in doing so he relied upon the statute. It was said, that, in order to make the rule applicable, there must be an express undertaking to pay the sum at which the bill might be taxed. There is, however, substantially the undertaking to pay, for a party bringing a suit for an account will be ordered to pay the balance if it be found against him. This is the only security for payment which the solicitor can have, as a preliminary to taxation, for since the statute, the bills have been ordered to be taxed without requiring the money to be brought into Court (c). The taxation of the bill of the solicitor of one party in a cause, as against the other party, has no application to the present case.

I have no doubt of the jurisdiction of the Court to deal with the costs of the taxation of the bill of the solicitors, who are the Defendants in this cause, although that jurisdiction is not founded upon the statute. I think, in this case, the costs of taxation must be considered with reference to the general costs of the suit, notwithstanding that more than a sixth part of the bill has been disallowed.

The general costs of the suit are commonly governed by the event of the suit, and, if so treated in this case, would fall upon the Plaintiff, who has failed to shew that nothing was due to the Defendants, whilst the latter, on the other hand, have established their debt.

(a) 14 Ves. 154.

(b) Anonymous, 2 Ves. 451.

(c) 4 Sim. 125.

1842.—Cook v. Fryer.

Under all the circumstances, however, I think it is not a case in which costs should be given on either side.

*COOK v. FRYER.

[*498]

1842: April, 28, 29, 30, May, 7.

On the proposed marriage of the infant daughter of one who was non compos mentis, a petition was presented to the *Lord Chancellor*, under the stat. 4 Geo. 4, c. 76, s. 17, for his consent, in order to obtain a license. The petition was referred to the Master; and the intended husband, by affidavit, stated that he had agreed to make a certain settlement. The Master reported in favour of the marriage, and the report was confirmed. The parties did not avail themselves of the consent of the *Lord Chancellor*, but shortly afterwards married, under the act 6 & 7 Will. 4, c. 85, without license. The settlement mentioned in the affidavit was not made,—the parties having entered into articles for a different settlement.

Held, that the proposal laid before the Master amounted to a contract, which, in the absence of any settlement properly substituted for it, the Court would enforce.

Semle, it was not incompetent to the parties before the marriage to vary bona fide the terms of the contract, notwithstanding it had been approved by the Court.

Under the circumstances, a party named as a trustee in the articles, but who had not acted or executed any deed of trust, was allowed to sustain a suit to carry the articles into effect.

In July, 1838, on the occasion of a treaty of marriage between the Defendants, Mr. *Fryer*, and the daughter of Sir *Gregory Page Turner*, a petition was presented to the *Lord Chancellor* praying a declaration under the act 4 Geo. 4, c. 76, s. 17 (a), that

(a) "That, in case the father or fathers of the parties to be married, or one of them so under age as aforesaid, shall be non compos mentis, or the guardian or guardians, mother or mothers, or any of them, whose consent is made necessary as aforesaid to the marriage of such parties, shall be non compos mentis, or in parts beyond the seas, or shall unreasonably or from undue motives refuse or withhold his or their consent to a proper marriage, then it shall and may be lawful for any person desirous of marrying, in any of the before mentioned cases, to apply by petition to the *Lord Chancellor*, *Lord Keeper*, or the *Lords Commissioners* of the Great Seal of Great Britain for the time being, *Master of the Rolls*, or *Vice-Chancellor of England*, who is and are respectively hereby empowered to proceed upon such petition in a summary way; and, in case the marriage proposed shall, upon examination, appear to be proper, the said *Lord Chancellor*, *Lord Keeper*, or *Lords Commissioners* of the Great Seal for the time being, *Master of the Rolls* or *Vice-Chancellor*, shall judicially

1842.—Cook v. Fryer.

[*499] the marriage was *proper, the lady being an infant, and her father non compos mentis. The petition was referred to the Master, and on the 24th of July, on the part of Mr. *Fryer*, a state of facts and affidavit, signed by him, were carried in, to the effect that he had agreed to pay to or invest in the names of four trustees the sum of 20,000*l.*, or stocks, funds, and securities to that amount, to be settled upon such trusts for the benefit of himself, his intended wife, and the children of the intended marriage, as should be approved by Lady *Turner*; and had also agreed to settle, upon similar trusts, the future property of his intended wife. On the 2nd of August the Master made his report, approving of the marriage, and on the 4th of August the report was confirmed. About the same time the draft of a settlement was prepared in conformity with the proposals laid before the Master. Mr. *Fryer* subsequently desired to alter the proposed settlement, by making it to comprise certain freehold premises, rent-charges, leases for lives, and other property, instead of the said sum of 20,000*l.*, but exceeding that sum in value. To avoid the necessity of a second application to the Court founded upon the new proposal, it was arranged between the parties, that the marriage should take place by banns or otherwise without license, thereby rendering it unnecessary to obtain the sanction of the Court. Instructions were given to other solicitors, by whom the draft settlement was altered in conformity with the substituted proposal; and on the 22nd of August, 1838, the marriage took place, at Southampton, under the provisions of the 6 & 7 Will. 4, c. 85, without license.

The Plaintiff had, prior to the making of the first draft of settlement, been applied to and consented to become a trustee, and he was made a party as such trustee in that, and also in the [*500] substituted draft; but he did not *execute any instrument indicating his acceptance of the trusts; and he was ignorant of the alteration of the settlement until informed of it by the solicitors of Mr. *Fryer*, in October, 1838.

declare the same to be so; and such judicial declaration shall be deemed and taken, to be as good and effectual, to all intents and purposes, as if the father, guardian or guardians, or mother of the person so petitioning, had consented to such marriage."

1842.—Cook v. Fryer.

The settlement existing only in articles, and some correspondence having taken place on the proper mode of completing it, the Plaintiff instituted this suit, which was against Mr. and Mrs. *Fryer*, and prayed, in the alternative, that the agreement stated in the proposals laid before the Master, or the substituted agreement entered into before the marriage, might be performed.

Mr. *James Russell*, and Mr. *Daniell*, for the Plaintiff, said that, he being named in the original articles as a trustee and having consented to accept the trust, it was his duty to require the agreement for a settlement to be performed; that the second settlement might be taken as additional to, but could not be accepted in substitution of the first, and as a performance of the contract, without the sanction of the Court. *Luders v. Anstey* (a).

Mr. *Teed*, and Mr. *Willcock*, for the Defendant Mr. *Fryer*.

There is no equity to sustain the suit; for, first, there is no contract in writing signed by the party to be charged therewith, and therefore the statute is an answer to the bill. Secondly, the husband did not avail himself of the declaration of the propriety of the marriage, which was the object of the petition and Master's report, and the whole of that proceeding must be regarded as a nullity. The only contract is that which is contained in the second draft of settlement. Thirdly, the Plaintiff, although [*501] named in the draft as a trustee of the latter settlement, has never been constituted such trustee in any deed or by any act, and he has never accepted the trusts of it: his nomination is, therefore, nothing more than an intention which was entertained by the parties to the settlement, and which they may revoke by naming another person in the instrument; and the mere intention to appoint the Plaintiff as a trustee does not give him a right to sue. The Defendant had always been ready to perform the agreement contained in the second draft, and therefore, in that respect, the suit was unnecessary.

1842.—Cook v. Fryer.

Mr. *Sharpe*, for the Defendant Mrs. *Fryer*, insisted on similar objections to the suit.

VICE-CHANCELLOR:—

I cannot accede to the argument that Mr. *Fryer* was not bound by the proposal carried into the Master's office on his behalf. Let the case be supposed of a person who had obtained the consent of a father to a marriage with his daughter, and signed an agreement to make a settlement, and who afterwards privately procured the celebration of the marriage by banns. The Court would not allow him to say that he had married under a different agreement, without the father's consent, and therefore that he was not bound by the settlement he had originally proposed for the purpose of obtaining that consent. There can be no substantial difference between the case of a party making the representation to the Court that he was willing to enter into a certain contract, and the same party making a similar proposal out of Court. The Statute of Frauds re- [*502] quires evidence in *writing of the contract, and if, upon the marriage, there was a contract in writing, it cannot be of less force because it was carried into the Court of Chancery and made the ground of an application to the Great Seal.

It is impossible to deny that that which took place in the Master's office was a contract with the Court. A marriage being in contemplation, application was made to the *Lord Chancellor* for his consent; and it was referred to the Master to inquire if it was a proper marriage. The person about to be married then carried into the Master's office a state of facts, supported by affidavit, which was signed by himself, in which he stated, that he had agreed to make a certain settlement if the marriage took place. Supposing nothing more was done on the subject of the settlement, and a marriage had followed, I have not the least doubt that, in favour of the issue of the marriage, this Court would have said that, under such circumstances, there was an agreement in writing sufficient to satisfy the Statute of Frauds, and there being that agreement the Defendant could not say that, because he had been married by banns and not by license,

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the agreement was a nullity. The suggestion is, not that the agreement is made in consideration of marriage by license, but in consideration of marriage generally ; and it is laid before the *Lord Chancellor* as a foundation for him to consider whether the marriage was proper, without reference to the manner of celebration.

The next point is, whether the second articles are to be considered as an addition to, or as a substitution for, the first proposals. It is impossible to read the pleadings in the cause without seeing that the second articles are represented as a substitution, and nothing else. They are either to be rejected altogether, on the ground "that the first proposals are conclusive ; or, if adopted, [*508] they are to be adopted at the sacrifice of the first proposals. The whole statement is, that, after the first proposal was made, it was considered more convenient to Mr. *Fryer*, and more beneficial to the family, that, instead of settling the 20,000*l.*, he should settle what was worth more than 20,000*l.* There had been drafts prepared by the solicitor,—those drafts were altered with a view to substitute one property for another. The papers were before counsel, by whose advice the drafts originally prepared were altered ; and upon the altered articles it was that the second settlement was founded. The whole case therefore, as regarded the different proposals, was, not to make the second an addition to the first, but to alter the first so as to make it conformable to the altered views of the parties.

The marriage having ultimately taken place without license, the question is, whether it was competent to the parties to vary the proposal ? If there had been no application to the *Lord Chancellor*, and Lady *Turner* acting on behalf of her daughter had come to an agreement with Mr. *Fryer* for a settlement, I do not say that before the marriage took place, Lady *Turner* and Mr. *Fryer* might not have varied the terms of that agreement. If they had varied them, and the marriage had afterwards taken place on the faith of the altered proposals the altered proposals would certainly have been binding, if the first were avoided ; and the question then is, whether the circumstance that the proposals were altered, and that alteration was not confirmed by the Court, can vary the case ?

In order that the Court may arrive at a conclusion on these *ques*
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tions, the facts stated in the answers may be taken to be
 [*504] true, so far as the Plaintiff and the Defendants are concerned, who have brought forward the case upon bill and answer ; but I cannot assume the facts to be stated, so as to bind the interests of unborn children of the marriage.

It was however said, that whatever the equities of the parties who should claim under the settlement might be, the Plaintiff was not a trustee, and could not sustain the suit. Upon reading the correspondence between the Plaintiff and the Defendants, and their solicitors, I think it is not competent to the Defendants to raise that objection. [His Honor read several passages in the letters, shewing the recognition of the Plaintiff as trustee, and his acceptance of the trust.] It is impossible to say, that there was no such acceptance of the trust as to authorize the Plaintiff in this suit to call upon the Defendants to execute the articles.

There is at present, as it is alleged, no issue of the marriage ; and there is no reasonable doubt that the second proposals are more beneficial to these parties ;—if all the parties to this suit consent, an enquiry may be directed in this suit, whether it would be proper and for their benefit, that the second articles should be confirmed ; but if this be not consented to, the only order I can make is, that it be referred to the Master to enquire under what circumstances the second articles were entered into, with liberty to report specially.

 [*505]

*GWYTHER v. ALLEN.

1842 : May 2.

Under a direction by will to accumulate and lay out a certain sum of money in the purchase of land to be settled to uses thereby declared, the costs of the investment are to be paid out of the particular sum directed to be invested.

LORD MILFORD, by his will, dated in 1820, directed that the trustees thereby named should stand possessed of the residue of his personal estate therein mentioned, and of and in the rents and

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profits of his real estate during the several estates and interests thereinbefore limited to them, until the Plaintiff, and the other persons therein named, should respectively attain their ages of twenty-one years, upon trust from time to time to invest and accumulate the same respectively, and the interest and annual produce thereof ; and when and as soon as the said trust-monies, stocks, funds, and securities should accumulate and amount in the whole to the sum of 20,000*l.*, upon trust that his said trustees should convert into money all the said stocks, funds, and securities, and invest the same in the purchase of lands or hereditaments of an estate of inheritance in fee-simple in possession, to be situate somewhere in the county of Pembroke, and should convey, settle, and assure such lands or hereditaments as might be so purchased to the same uses, upon and for such and the same trusts, intents, and purposes as were thereinbefore limited or declared of the real estate thereinbefore devised ; and, upon further trust, that his said trustees should pay the surplus of the said trust-monies, stocks, funds, and securities (if any), after the said last-mentioned investment, unto the person who, at the time of investment, should be entitled to a freehold estate of and in his said lands, hereditaments, and real estate last thereinbefore devised, and should pay the rents and profits of his said real estate, which should be received by his said trustees after the said last-mentioned investment, by *vir- [*506] tue of the said limitations to them, until the Plaintiff, and the other persons therein named, should respectively attain the age of twenty-five years, unto the persons who should become entitled to the possession of his said real estate, or any part thereof, under the limitations contained in that his will, immediately after the determination of the estate, by virtue whereof the same rents and profits should be received by the said trustees.

The sum of 20,000*l.* having been accumulated, the trustees invested 18,765*l.* 3*s.* in the purchase of real estate, and this sum, with 1,234*l.* 17*s.*, the costs and expenses incidental to the investment, exhausted the 20,000*l.* The trustees desired the sanction of the Court to this disposition of the fund ; and the bill was filed by the Plaintiff claiming to have the full sum of 20,000*l.* invested,

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and the costs of the investment paid out of the general personal estate, which was ample.

Mr. *Pole*, for the Plaintiff, said, that the parties entitled under the gift of the surplus could only take such surplus after 20,000*l.* had actually been invested, which had not been done.

Mr. *Sharpe*, contra.

If the value of the land to be purchased had been specified, the costs must have been paid besides ; but where the sum to be invested is named, it cannot be enlarged. The purchase of lands, of necessity, involves expense, and must diminish the fund so applied. When the 20,000*l.* was accumulated, the tenant for life might immediately have demanded his surplus.

Mr. *Romilly*, for the trustees.

[*507] THE VICE-CHANCELLOR said, that the 20,000*l.* was the extent of the gift for the purpose of the investment, and the costs of the investment must be paid out of that sum.

The costs of the suit were ordered to be paid out of the general personal estate.

SMITH v. DUKE OF BEAUFORT.

1842: May 24, 31. June 2.

An admission in the answer to a bill of discovery, that the defendant possessed documents specified in a schedule wholly or in part relating to the matters mentioned in the bill, not accompanied by a precise denial of a precise case which the bill specifically charged, or by a denial that the documents related to that case, *Held* to entitle the plaintiff to the inspection of all the documents in the schedule which might be evidence on the case so specifically charged, although the defendant said they were the evidences of his own title. [1]

THE Duke of *Beaufort* brought an action, at law, against the

[1] Where Defendants in their answer stated in the beginning of their answer, that they could not answer further than as appeared therein and in the various documents which were set forth in the schedule and which they offered to produce. In

 1842.—*Smith v. Duke of Beaufort*.

Plaintiff (a) : the declaration therein alleged that the Plaintiff was, on the 1st of November, 1840, indebted to the Duke in 1000*l.*, for

the latter part of their answer they admitted the possession of various documents but insisted that all correspondence or copies of any correspondence, or other communications in writing, passing between the defendants, or their respective secretaries, clerks or agents, or any or either of them on the one hand, and their respective solicitors or clerks of their solicitors or any or either of them, were privileged communications, and therefore not bound to produce them. Lord Cottenham held that after the offer of production in the beginning of the answer, the plaintiffs were entitled to the production of all the documents mentioned in the schedule and that upon the ground that the defendant had made the documents part of their answer that where a party referred to a document and partly set it out, he could not afterwards tell the plaintiff he should not see it. The plaintiff was not bound to take the defendant's construction of the document. If the defendant used it at all the plaintiff was entitled to know that it was stated properly. The Lord Chancellor said, "If the defendant had set out one of the documents and said, 'that except as therein stated he did not know,' the plaintiff would clearly be entitled to see the document. The defendants here have said so with regard to all these documents. If the statement in the answer does not mean that, it means nothing, because if the defendant sets out the document, and then says 'I know nothing further but I will not produce it,' it is virtually saying 'I will not give you any information at all.'" *McIntosh v. The Great Western Rail W. Co.*, 1 Hall. & Twells. 44.

But where the defendant in his answer to a bill seeking discovery in aid of the plaintiff's defence to an action at law, brought by the defendant against him stated, that the letters, papers and writings scheduled to his answer, contained the evidence on which the defendant was advised and intended to rely at the trial of the action, and that the same did not nor did any of them, "as the defendant was advised and verily believed" contain any evidence whatever in support of the plaintiff's plea in the action, and that the same were not in any manner material to the plaintiff's case. Lord Cottenham held, that the statement was a sufficient answer to the plaintiff's for production and inspection of the scheduled documents. *Piele v. Stoddart*, 1 Hall. & Twells. 209. In *Bannatyne v. Leader*, 10 Sim. 230, the Vice Chancellor held, if a defendant denies the plaintiff title, and says positively, that the documents in his custody relative to the matters in the bill, will not show the plaintiff's title, the court will not order him to produce them: but if he says merely that he *believes* they will not show the plaintiff's title, the court will order him to produce them. Lord Cottenham in the case of *Piele v. Stoddart*, above cited in reference to the language of the denial says, "the expression used by the defendant in his answer was, not that he had been advised, and *therefore* believed, the belief being the result of the advice, but that he had been advised and verily believed; he thought the scheduled letters and papers were sufficiently protected by the form of denial used by the defendant in his answer."

(a) The word "plaintiff," where no other description is added, refers to the plaintiff in equity.

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divers customs, duties, tolls, and sums of money due and of right payable by the Plaintiff to the Duke, upon and for divers coals, be-

To protect a defendant from the discovery or production of a document relating to the subject in dispute, it is not sufficient that it should be evidence of his title, or contain evidence which he intends or is entitled to use in support of his case: it must contain no matter supporting the plaintiff's title or case, or impeaching the defence, and the defendant must by his answer, with a reasonable degree of distinctness aver that the document does contain no such matter. *Combe v. The Corporation of London*, 1 Young & Coly, 631. Vice Chancellor, Sir J. L. Knight Bruce, in the case last cited, says, "To protect a defendant from the discovery or production of a document, relating to the subject of dispute, it is not sufficient that it should be evidence of his title or contain evidence that he intends, and is entitled to use in support of his case.

It may be also of a similar character with regard to the plaintiff's case, either in a directly affirmative manner or by exhibiting matter at variance with the defence, or tending to impeach it." * * * If it be with distinctness and positiveness stated in an answer, that a document forms or supports the defendant's title, and is intended to be, and may be used by him in evidence, and does not contain any thing impeaching his defence or forming or supporting the plaintiff's title, or the plaintiff's case; that document I conceive, protected from production unless the court sees, upon the answer itself, that the defendant erroneously represents or misconceives its nature. But where it is consistent with the answer that the document may form the plaintiff's case, or may contain matter impeaching the defence, then I apprehend the document is not protected, if the character ascribed to it by the defendant is not averred with a reasonable and sufficient degree of positiveness and distinctness.

Where the plaintiff in his bill charged that the defendant had in his possession certain documents relating to the matters charged whereby the truth thereof would appear, and prayed that the defendant might set forth a list of them, the defendant admitted in his answer that he had the documents in his possession, but denied that thereby the truth of such matters would appear or any of them save as by the answer is mentioned. The court held that having admitted that he had in his possession documents which related to the matter in the bill he was bound to produce them, and that it was not a sufficient answer to say that they would not establish the truth of the matters charged by plaintiff, that the plaintiff had a right to see the documents and judge for himself. *Smith v. Duke of Beaufort*, 1 Phil. 218. See also *Griffith v. Edwards & wife v. Peirce Jones & wife*, 1 Phil. 501, S. C. 18 Sim. 632. *The Marquis of Bute v. The Glamorganshire Canal Co.* 1 Phil. 681. *The Atlantic Ins. Co. v. Lunar*, 1 Sandf. Ch. R. 91.

In reference to the granting orders of this kind, Lord Cottenham says, "The power of the court, for the production of documents, is used in order to enable a party interested in them to obtain justice; and at the same time the court will also endeavor to prevent the party against whom the order is made from sustaining any injury. There are no orders which are so much in the discretion of the court as

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fore then raised and gotten by the Plaintiff, within and from the Duke's manor and seignory of Kilvey, in the county of Glamorgan, and before then carried through the said manor and seignory, and sold and exported to sea over Swansea bar. And for divers other customs, duties, tolls, and sums of money before then due and of right payable and renderable by the Plaintiff to the Duke, upon and for divers other coals before then raised, gotten, and taken by the Plaintiff within and from the Duke's manor and seignory, and for divers other sums of money due and of right payable and renderable by the Plaintiff to the Duke as the owner of the manor, for certain other customs, duties, tolls, and customary payments, before then due and of right payable and render- [*508] able by the Plaintiff to the Duke, as such owner of the manor. The Plaintiff pleaded the general issue, and issue was joined.

The Plaintiff filed his bill of discovery, stating his title as lessee, under Lord *Jersey*, of the Lansamlet colliery, with the free use of the coal bank at White Rock, and of the dock there for ships and vessels to load and unload, and his possession of the same since April, 1833; and also stating his title as lessee of Old Church Pit colliery, and his possession thereof since August, 1838, both of which collieries were within the said manor; and alleging that the river Tawe had been from time immemorial a public navigable river, free of tolls except such as were payable to the trustees of Swansea harbour, under the acts relating thereto,—that the coal worked by him from the said collieries was brought to a wharf on the left bank of the Tawe, and the greater part of it was sold to masters of vessels resorting thereto for that purpose, who departed therewith, but the Plaintiff was not himself a shipper or exporter of coal: that the wharf was made by a lessee, under whom the Plaintiff derived his title, in conformity with the powers of his lease; that under an alleged custom, the Duke, as lord of the manor of Kilvey, claimed 4*d.* for every wey of coal raised and gotten within and from the man-

orders of this description and they are not to be extended against the defendant beyond what necessity requires. *The Corporation of Berwick upon the Tweed v. Murray*, 1 Hall & Twells, 445.

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or and seignory of Kilvey and carried through the manor and seignory, and sold and exported to sea over Swansea bar; and that under such alleged custom the said action was brought.

The Plaintiff charged that the alleged customary payment began to be made at a time subsequent to the reign of King Richard the First, and that coal was first raised within the manor, [*509] and first exported to sea *therefrom over Swansea bar, many years after that reign: that the way of coals, upon which the alleged customary payment of 4*d.* had been made, had been sometimes a way of 144 bushels, and at other times of 216 bushels, and had sometimes been reckoned upon forty-eight bags, and at other times upon ninety-two bags to the way: that the next immediate predecessor in title of the Duke had claimed the manor and seignory in like manner and by the like title as the Duke, and that his said predecessor appointed Lord *Fitzroy Somerset*, and Earl *Granville*, executors of his will, and such executors, in November, 1838, filed their bill against the Plaintiff for the recovery of the alleged arrears of the said customary payment; and by such bill the custom was laid in the terms following: viz.—that from the time whereof the memory of man runneth not to the contrary, there had been, and of right ought to be, paid and payable to the lord or lords, lady or ladies, of the manor of Kilvey, for the time being, and as such lord to the said late Duke, during his lifetime, for every way of coal raised and gotten within, from, out of, or under the manor of Kilvey, or any part thereof, and shipped to sea over Swansea bar, and for the ways and places to lay it down by the water side, and for the liberties of the river, the sum of 4*d.*: that the Plaintiff, by his answer to the said bill, stated that he did not himself ship or transport coal over Swansea bar, but sold the same at his wharf; and that, thereupon, the said executors of the late Duke amended their bill, and claimed the said customary payment as being due in respect of coals sold to sea over Swansea bar.

The bill charged that there was a document bearing date the 27th of September, 1686, in the possession or custody of the Duke or in his maniment-room at Badminton, purporting to be a [*510] survey or copy of a survey *of the manor of Kilvey, with-

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in the alleged custom is entered, as, "for every wey of coal wrought within the manor, and sold to sea, and for the ways and places to lay it down by the water side, and for the liberties of the river, the sum of 4*d.*, after the rate of 16*d.* for every last." And that the Duke had other surveys, inquisitions, books and documents shewing the terms, or supposed terms of the alleged custom. That the alleged right of the Duke to the water channel and soil of the river Tawe, and to the port and harbour of Swansea, and the soil thereof, and to the admiralty of the seas, bays, havens, ports, and rivers within or bordering or surrounding the port and harbour of Swansea, are not nor are any of such alleged rights appurtenant to the manor or seignory of Kilvey.

The bill charged that the alleged customary payment of 4*d.* originated in some compromise of disputed rights of very limited local extent, not comprehending the said collieries; or in the grant or allowance of some easement or wayleave now expired, made by the predecessors of the Duke, for the transit, deposit or exportation of coal, or otherwise in relation thereto; and that, although the alleged custom had been sometimes laid as providing, by way of easement, ways and places to lay down the coal by the water side, yet some or one of the Duke's predecessors had sometimes made a special bargain, and received a special compensation for such ways and places, and that, by an indenture of lease dated the 8th of December, 1750, the then Duke of *Beaufort*, in consideration of a yearly rent, granted for a term of ninety-nine years, unto *Chauncey Townsend*, his executors, &c., (through whom the plaintiff derived title), power to dig, trench, and use all other lawful ways and means for making, laying down, and carrying on such waggon ways, "and streets, and passages, along, across and over all [*511] the highways and waters within the manor and lordship royal of Kilvey, and upon and over the closes therein mentioned, as should be useful, necessary, and convenient for the carrying of all such coal and culm as should from time to time be wrought, raised, and landed from, in, out of, and under the lands therein mentioned, (including the said collieries), to the river side, and for the carry-

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ing back of materials as therein mentioned ; and for that purpose did thereby grant to the said *C. Townsend*, his executors, &c., power to enclose, fence in, and ditch any part of the said lands not exceeding thirty-six feet in breadth, making satisfaction to the occupiers as therein mentioned ; and did also grant to the said *C. Townsend*, his executors, &c., power to erect, build, and make any wharf or wharfs, quay or quays, in, at, or near the sides or banks of the river Tawe, for the shipping of the said coals and culm, so that no damage or prejudice were done to the navigation of the river, and reserving and paying to the Duke, his heirs and assigns, all such customary dues and payments as were and should, from time to time, become due and payable unto him and them as lord of the said manors or lordship royal. And that, by an indenture dated the 22nd of February, 1783, the then Duke of *Beaufort* granted, for a term of sixty-eight years, unto Lord *Vernon*, his executors, &c., certain lands therein mentioned, with power to make a navigable canal through them, for the carriage of coals from the coal works, under the estate of Lord *Vernon* in *Lansamlet*, and to dig a basin for barges and lighters, and make a wharf and bank for the landing and shipping of coals and other things, Lord *Vernon*, his executors, &c., paying such rent as therein reserved ; the said indenture containing no reference, saving, or reservation in respect of the alleged customary payment of 4*d.*

[*512] The bill charged that the Duke did not afford any easement to the Plaintiff with respect to the said coal, and that the Duke was not, in fact, seised or possessed of the banks of the river, or of ways or places to lay down coal at the place where the coal of the Plaintiff was shipped ; nor was the Duke, as lord of the manor of *Kilvey*, exclusively possessed of the banks of the river generally, or of any rights or authorities over the river, for the banks thereof were the property of various individual proprietors : that the port and harbour of *Swansea* was not repaired or kept up by the Duke, but the same was done under several acts of Parliament, and the claim of 4*d.* had never been made in respect of coal raised in the manor of *Swansea* and shipped from the right or *Swansea* bank of the *Tawe* ; and that the claim of 4*d.* per woy

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had sometimes been made in respect of coal carried through the manor and so sold and exported to sea, but not raised within the manor.

The bill charged that the Duke had in his custody or power, or there were in his muniment room at Badminton, various deeds, instruments, inquisitions, surveys, cases, opinions, books, accounts, and other documents relating to the said matters, whereby the truth thereof would appear, and prayed, in the usual form, that he might set forth a list of the same.

The Duke, by his answer, stated that he was seised of or entitled to divers honours, seignories, manors, or lordships, lands, tenements, and other hereditaments in the county of Glamorgan, with their rights, royalties, members and appurtenances, as tenant for life, and amongst others he was seised of or entitled to the borough, castle and manor of Swansea, and the liberties thereof, and the seignory, manor, or lordship of Kilvey, with the rights, *royalties, franchises, members and appurtenances there- [*513] unto belonging; and his son, the Marquis of *Worcester*, was the first expectant tenant in tail of the same: that the lands and hereditaments which constitute the said seignories, manors, or lordships are of great extent, and were, in ancient times, known by the general name of the land of Gower, and by that name were granted by King *John* to *William de Breons*, and his heirs, from whom they passed, by marriage, to the family of the Earls of *Pembroke*, and from them, in like manner, to the family of the Earls of *Worcester*, ancestors of the Duke. The Duke said, that by charter, prescription, or other good and lawful title, he and his ancestors and predecessors was and were entitled to all royalties within, or of, or belonging to the said manors respectively, and among others to all wrecks of the sea, flotsam, jetsam, ligam, and wharfage, anchorage, keelage, and tolls thereon, and to the sea shore of Swansea and Kilvey aforesaid, between the high-water and low-water mark, and to the water channel and soil of the river Tawe, and the port and harbour of Swansea, and the soil thereof, with all tolls, franchises, and privileges thereunto belonging, and also to the admiralty of the seas, bays, havens, ports, and rivers within or bordering or surround-

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ing the same ; and he believed that, for several hundred years past, there had been, and of right ought to be, paid and payable to his ancestors or predecessors, and that there was now payable to him, for every wey of coal raised and gotten within and from the manor of Kilvey and carried through the manor, and sold and exported to sea over Swansea bar, the sum of 4*d.*, every such wey consisting of forty-eight bags, and every bag containing three bushels of Winchester measure ; and he said that such wey of coal was the old or ancient wey, as distinguished from what had been called the [*514] new wey, which consisted of *twenty-two bags. The

Duke admitted that the river Tawe was a public navigable river, and that the subjects of the Kings and Queens of this realm had, at all times, the use of the river for all purposes of navigation, but, to the best of his belief, he denied it to be true that they had such use without the payment of any toll or duty, save only such as were mentioned in the bill. The Duke said that he claimed the said 4*d.* for every ancient wey of coals raised from the said respective collieries, and sold and exported to sea over Swansea bar, not exclusively as a customary payment, due, and of right payable to him as lord of the manor of Kilvey, but generally as a payment due and of right payable by the Plaintiff to him, upon coals raised and gotten by the Plaintiff within and from the manor and seignory of Kilvey, and carried through the said manor and seignory, and sold and exported to sea over Swansea bar ; and he was advised and believed that such claim might be supported as a customary payment, existing beyond the time of legal memory, or as a toll traverse or in the nature of a toll traverse, or as a port duty, or in the nature of a port duty payable to the owner or proprietor of the port and harbour of Swansea, or as payable by virtue of some agreement or arrangement between the land-owners and the lord of the manor of Kilvey, at some remote period, or as being a reservation made to the lord of the said manor, as the original owner of all the lands therein, before or when he parcelled out his demesne lands to the fee tenants of the manor ; and that, upon evidence shewing that the said sum of 4*d.* per wey had been constantly paid and rendered far beyond any living memory, and, as he believed, for several

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hundred years past, a court of law would refer the same to some good and lawful origin. The Duke stated the contents of a charter made in 1305 by *William de Breons*, granting to "the burgesses of Swansea divers estovers in his woods, [*515] viz. dead or dry wood to burn, and oaken wood to build and repair their houses in the borough, and their great and little ships, and earth coal for their necessary use, but not to sell or give to strangers, except to guests or travellers coming to the borough; and he referred also to several acts of Parliament relating to the borough and harbour of Swansea, reserving to the Duke the tolls, dues, and payments for the coal raised in the manor of Kilvey, and the royalties, rights, tolls, duties, jurisdictions, liberties, and franchises of the Duke and his heirs and successors in the seignories of Gower and Kilvey, and admiralty of the sea, havens, and rivers surrounding the same. The Duke said that he did not believe it to be true that the custom had been differently laid in different times, for though the words used were different, the import was the same in substance: that the executors of the late Duke had set up only a limited claim of 4d. per wey, as payable to the lord of the manor of Kilvey; but the claim which he (the Duke) now made was a general claim, as for so much money due and of right payable to him either as a custom or otherwise as aforesaid. The Duke admitted his possession of the survey of the 27th of September, 1686, and other surveys, inquisitions, books, and documents containing entries relating to the said payment of 4d. from which the terms or supposed terms of the said payment or duty would appear. The Duke, to the best of his knowledge, information, and belief, denied it to be true that the said payment or duty had varied in respect of the number of bushels contained in a wey of coals upon which the same had been demanded and paid, or that the same had been sometimes 144, and at other times 216 bushels, or at sometimes forty-eight bags, or at other times ninety-two or seventy-two bags. And the Duke said that the "payment of 4d. was [*516] an ancient payment or duty for or in respect of the old or ancient wey of forty-eight bags, every bag containing three bushels of Winchester measure as he was informed and believed,

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making together 144 bushels in such old or ancient way as distinguished from the new way of seventy-two bags containing 216 bushels. And the Duke said he was informed and believed that, when the coals were measured by the ancient way, the payment in respect thereof was always 4*d.*, and that in latter times, when the coals were measured by the new way, the same was, for the purpose of the said duty, turned into the old way by adding one third of the number of new ways, and the sum of 4*d.* was paid on the number of ways obtained by such addition. The Duke said he was informed and believed that, by a mistake or inadvertence, payment was received by the then Duke from the said *C. Townsend*, from 1741 to 1759, of 4*d.* calculated on the new way, and that such mistake being discovered was corrected by the said *C. Townsend*, accounting for and paying all the arrears or deficiency, so as to make up the payment of 4*d.* on the old way; and the Duke said he was informed and believed that there was no other instance of any such mistake. The Duke denied it to be true that the custom had sometimes been laid as providing, by way of easement, ways and places to lay down the coal by the water side, or that any of his predecessors had sometimes, or at any time, made a special bargain or received a special compensation for ways and places to lay down coals raised within the manor of Kilvey by the side of the river Tawe. The Duke admitted the indenture of the 8th of December, 1750, and the 22nd of February, 1783, and said, that the liberties and privileges were thereby granted for a nominal consideration, in order to encourage the exportation of coal, and thereby

[*517] increase the "revenues arising to the Duke from the said payment. And he said that he did, as he was advised and believed, afford an easement to the Plaintiff in respect of the said coal, for that he was seised or possessed of the banks of the Tawe, or ways and places to lay down coal at the place or wharf where the coal of the Plaintiff was shipped, inasmuch as the soil of the river and of the port and harbour of Swansea belonged to him, and no coal raised by the Plaintiff within the manor could be shipped or exported from the river or port without passing over land be-

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lenging to him (the Duke), and no wharf could be erected on the bank of the river without lying or touching on such land.

The Duke admitted that he had in his custody or power, and that there were in his muniment room at Badminton, various deeds, instruments, surveys, cases for the opinion of counsel, books of account, accounts, ledgers, entries, letters, copies of and extracts from letters, vouchers, receipts, memoranda, papers, and writings, wholly or in part relating to the matters in the bill mentioned, or some of them, but he denied it to be true, that thereby the truth of the matters in the bill stated and charged, or any of them, would appear or be elucidated save as by the said answer was mentioned. And the Duke in the second schedule (a) to his answer set forth a list of all such documents. And he said that the several documents in such schedule were the title-deeds, evidences, and muniments of or belonging to him as the tenant for life as aforesaid, and the same respectively evidence or relate to his right and title as tenant for life, and of his son, the Marquis of Worcester, as tenant in tail in remainder to the said estates and hereditaments, and to the said duty or payment of 4d. per *wey, and did not in any manner evi- [*518]
dence or relate to any estate, right, or title whatsoever, of or belonging to or claimed by the Plaintiff, nor were the same in any way material or necessary to or for the Plaintiff's defence in the action, nor had the Plaintiff any interest whatsoever in the same or any of them, and he submitted that the Plaintiff was not entitled to the production thereof.

A motion was now made on behalf of the Plaintiff, for the production of the documents specified in the schedule.

Mr. Lloyd, for the motion.

Mr. L. Loundes and Mr. Campbell, for the Duke of Beaufort opposed the motion.

(a) See a copy of this schedule, *infra*, p. 525, in which the documents ordered to be produced are distinguished.

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The cases referred to were *Smith v. Duke of Northumberland* (a).
Bolton v. Corporation of Liverpool (b).

VICE-CHANCELLOR :—

The subject of the action at law to which the bill refers, is the claim of the Duke of *Beaufort* to a sum of 4*d.* for every wey of coal raised from the Plaintiff's collieries and "sold and exported to sea over Swansea Bar." The Duke insists that this payment has at all times been paid, and of right payable to his predecessors; and he claims it, either as being a customary payment due to him as lord of the manor of Kilvey, or as derived from any other legal origin to which an ancient payment may be referred.

The Plaintiff disputes the right thus claimed by the Duke, and insists by his bill upon three matters of fact, which, if they can be established in evidence, might certainly be material to defeat the claim of the Defendant.

[*519] The Plaintiff alleges, first, that the 4*d.* per wey in question has been paid at different times in respect of different quantities of coal. Secondly, that the custom has been laid in legal proceedings in terms substantially differing from each other by the Duke and his predecessors, or those who have represented the interest which the Duke now possesses. Thirdly, that in the consideration for the payment of 4*d.*, the Duke's predecessors, or those who have represented the like interest, have included, by way of easement, ways and places to lay down coal by the water side; but such easement has in fact been from time to time the subject of specific contract between the owners of the coal and the Duke's predecessors.

The bill seeks discovery as to these three several allegations, and contains the general charge of the possession of documents relating to the matters mentioned in the bill. To this charge, the answer is—[His Honor read the answer to the charge of the possession of documents (c).]

(a) 1 Cox, 362.

(b) 3 Sim. 467; S. C. 1 Myl. & K. 88.

(c) *Supra*, p. 517.

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Now upon this answer I observe,—that, according to my apprehension of the practice of the Court, an admission, in general terms, that the documents in the schedule are relevant to the plaintiff's case, throws upon the defendant, who makes that admission, the onus of excusing himself from producing the documents in the schedule. The answer, in this case, admits that the *docu- [*520] ments in the schedule are relevant to the Plaintiff's case, and that admission taken alone will *prima facie* entitle the Plaintiff to inspect them; *Story v. Lord George Lenox* (a), *Tyler v. Drayton* (b), *Neesom v. Clarkson* (c); and it is abundantly clear that, where documents in the Defendant's possession are admitted to be relevant to the Plaintiff's case, the Plaintiff, and not the Defendant, has a right to judge for himself of the materiality of such relevant documents; and that a suggestion in the answer, that the relevant documents will not prove the Plaintiff's case, is not alone an answer to a motion for their production.

Then has the Duke suggested any sufficient reason why he should not be ordered to produce for the Plaintiff's inspection those documents relevant to the matters mentioned in the bill, which he admits are in his possession?

The suggestions, and the only material suggestions in the answer, are—First, that the documents in the schedule are evidence, or relate to the right and title of the Duke and his son, Lord *Worcester*, and the duty or payment of 4*d.* per wey; and, secondly, that they do not in any manner, evidence or relate to any estate, right, or title whatsoever of, or belonging to, or claimed by, the Plaintiff. Now, the first branch of these suggestions is clearly insufficient; for, consistently with it, the documents may relate to the Plaintiff's case, and prove that case as well as the Defendant's; and it is only where documents are exclusively relevant to the Defendant's case, that the Defendant has a right to withhold them. There is no suggestion of such exclusive relevancy here. On the contrary, they relate to *the 4*d.* per wey, and the variance in the pay- [*521]

(a) 1 Myl. & Cr. 525; *S. C.* 1 Keen, 241.

(b) 2 Sim. & St. 309.

(c) *C. P. Cooper, Select Cases*, p. 69.

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ment is admitted and explained; *Burrell v. Nicholson* (a); *Bolton v. Corporation of Liverpool* (b); *Attorney-General v. Lamb* (c); *Combe v. Corporation of London* (d). The second, as it stands upon the answer, is as clearly insufficient. The Plaintiff, by his bill, has made three specific points, which I have already noticed. No one of these points, nor the conclusion to which they lead, can, with any approach to accuracy of language, be described as an "estate, right, or title of, or belonging to, or claimed by," the Plaintiff. The answer, denying only that the documents relate to "any estate, right, or title of or belonging to, or claimed by, the Plaintiff," may be studiously evasive. The fact is, that the Plaintiff has no case to establish, except a negative of the Defendant's claim; and the three points he makes by his bill constitute a case, by way of evidence only, leading to that negative. The Plaintiff, then, has a right to all such discovery as will enable him to prove that case; and, consistently with the answer, the documents may do that. This is obviously the spirit and meaning of the judgment in the case of *Bolton v. Corporation of Liverpool*, although the language of the Court in that case, being addressed to the particular facts of that case itself, may not, in terms, meet the case now before me. And it is not correct to say, that, if I ordered the Duke to produce the documents, to the production of which he objects, I should act against *Bolton v. Corporation of Liverpool*.

First, consider the case with reference to the alleged variance in the quantity of coal contained in the way, in respect of which the 4d. has been paid.

[*522] In *Bolton v. The Corporation of Liverpool*, the bill alleged generally, that, if the Corporation would produce their own documents relating exclusively to their own title, it would thereby appear that their case at law was unfounded, that is, that the production of the documents of the Corporation would furnish evidence against themselves. The defendants denied this allegation, and the Court decided, and I think properly decided, that where a defendant credibly denies the allegation upon which the plaintiff

(a) 1 Myl. & K. 680.

(b) *Id.* 88; S. C. 3 Sim. 497.

(c) 3 You. & Coll. 168.

(d) 1 You. & Coll. Chan. Ca. Not yet published.

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finds his title to a production of documents, relating exclusively to the defendant's case, the plaintiff has no right to call for an inspection of such documents only for the purpose of seeing whether he can by such inspection discover something which may invalidate the defendant's case.

That, however, is not the case here. The bill in this case alleges facts, as being within the knowledge of the Defendant, which, if true, will be material evidence for the Plaintiff in answer to the Defendant's case. Those facts may for the purposes of the present discussion be assimilated to a replication (though not strictly such) to the Defendant's case. They are strictly the Plaintiff's case. The onus of proving that case lies upon the Plaintiff, and discovery from the Defendant is evidence to which the rules of equity entitle him.

It was said, in argument, on behalf of the Defendant, that, if the Plaintiff had no right to inspect the documents in a case like *Bolton v. The Corporation of Liverpool*, he cannot be in a better position only because he alleges a specific defect in the Defendant's case, and makes that specific defect his own case. With this observation I am disposed to agree, provided the Plaintiff is unable to carry his case beyond his own allegation, and that allegation is denied by the answer. In this, as in every case, the question, whether the Defendant shall be compelled to produce the documents in his "possession for the Plaintiff's inspection, must depend up- [*523] on the answer. The reasoning of Lord Cottenham, in the case of *Adams v. Fisher* (a), and in *Story v. Lord George Lennox*, will clearly warrant this conclusion, whether that reasoning was correctly applied in *Adams v. Fisher* or not. And if, in the case before me, the Duke had alleged with due precision, that no such variance in the payments per way, as the bill specifically charges, appeared in any of the documents in the schedule, I might possibly have decided that the documents ought not to be produced. I see no other way of avoiding the conclusion adverted to in the argument, that a plaintiff, by alleging that which is untrue, might oth-

(a) 3 Myl. & Cr. 526.

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erwise entitle himself to the production of documents to which, according to the truth of the case, he was not entitled. It is obvious, that a plea (if a plea could be framed to meet the bill) would not in that respect place the defendant in a different situation from an answer; for the discovery asked would be directed against the truth of the plea. And if the defendant was not allowed by answer to protect himself against discovery improperly called for, he would be wholly without the means of defence,—which is absurd. I notice this in order that it may not be supposed that my judgment in this case proceeds upon the ground that the Duke might not by proper or sufficient averment have protected himself by answer against the production of documents, which, according to the truth of the case, the Plaintiff had no right to inspect. But that is not the question here. The Duke does not deny the alleged variance in the payments for the coal, but admits and explains the fact. The documents shewing this variance are, therefore, evidence of a case the Plaintiff has made by his bill. The body of the Duke's answer, containing that admission, might be read against him at law; [*524] and there is no principle *upon which I can refuse a production of the documents which (as Lord *Eldon* often said^(a) being in the schedule, and being also evidence of the Plaintiff's case, are in the same situation as if they were set out in *hæc verba* in the answer. If the case of *Bolton v. The Corporation of Liverpool*, as reported by Mr. *Simons* ^(b), is carefully examined with reference to the documents which the *Vice-Chancellor* ordered to be produced, that case will be found, to a great extent, an authority for the opinion I now express.

It is satisfactory to me to reflect, that the case of the Defendant, cannot be injuriously affected at law by the opinion I have formed; for although, in a cause seeking relief in equity, the Plaintiff may perhaps be entitled to read documents obtained from the Defendant's answer, apart from the body of the answer (*Miller v. Gow* ^(c)) at law, he can only read them as part of his answer, and will thereby

(a) *Wright v. Akyns*, 14 Ves. 213; *Evans v. Richards*, 1 Swan. 7.

(b) 3 Sim. 467.

(c) 1 Y. & Coll. Chan. Ca. 56.

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have the benefit of the explanation he has there given : *Miller v. Gow* ; *Brown v. Thornton (a)*. [1]

The observations which I have made upon the alleged variance in the quantity of coal, in respect of which the 4*d.* has been paid, apply, in some respects, to the other two points made by the Plaintiff. In each of the latter cases, the Duke, to some extent, admits the truth of the Plaintiff's allegation, though not with the same distinctness as in the first case.

My judgment, upon the whole case, proceeds upon this—that the admission of relevancy *prima facie* entitles the Plaintiff to inspect the documents,—and that the protection which the Duke claims is not claimed in terms "sufficiently definite [*525] and precise to entitle him to that protection.

The Defendant may yet, if he pleases, shew, by affidavit, that particular documents ought not to be produced (*b*).

The right of the Plaintiff to the production of the documents in the schedule, according to the principle referred to in the above judgment, was considered in the presence of counsel on both sides. The result appears in the following copy of the schedule, in which only the arrangement is altered.

Ordered to be produced.

The Earl of *Worcester's* Audit Rolls ; 33 H. 8, 3 Edw. 6, 5 Edw. 6, 1 Ph. & M., 5 & 6 Ph. & M., 1 to 42 Eliz., 1 to 17 J. 1, 2 to 17 C. 1. *Note*.—Most of the above audit rolls contain an entry or entries of receipts of monies on account or in respect of the payment of 4*d.* per wey in question, and in the others the account is returned in blank. 1702 to 1743—A series of rentals of the successive Dukes of *Beaufort* for each year, each containing entries of receipts of sums of money in respect of the payment of 4*d.* per wey in question. 1734 to 1831.—A bundle of original accounts, very many in number, delivered by or on behalf of the Honourable *Bussey Mansel*, from 1734 to 1741 ; *Bussey Lord Mansel*, 1742 to 1750 ; *C. Townsend*, 1751 to 1769 ; *J. Townsend*, 1769 to 1772 ; *J. C. and H. Smith*, 1773 to 1818 ; Plaintiff, 1829 to 1831.

8 Mar. 1741 ; 29 May, 1755.—Letters from *Gabriel Powell*, steward of the Duke of *Beaufort*, to his Grace.

(a) 1 Myl. & Cr 243.

(b) See *Llewellyn v. Badesley*. Next case reported.

[1] See *Bartlett v. Gillard*, 3 Russel, 149 *Davis v. Spurling*, 1 R. & M. 61. *Nurse v. Bunn*, 5 Sim. 225. *Cornish v. Hayward*, 1 Y. & C. 33.

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30 June, 1755.—Letter from *C. Townsend* to the Duke of *Beaufort*, and a copy indorsed thereon of his Grace's reply, dated 9 July, 1755.

10 June, 1755.—Letter from *Gabriel Powell* to the Duke of *Beaufort*.

14 July, 1755.—Letter from *C. Townsend* to the Duke of *Beaufort*.

29 Sept. 1755.—Letter from *C. Townsend* to *Gabriel Powell*.

5 and 26 October, 1755; 5 June, 1756; 5 July, 1756.—Letters from *Gabriel Powell* to the Duke of *Beaufort*.

20 Eliz. 1588.—A mutilated copy of a survey of the manor of *Kilvey*.

27 Aug. 1650.—Survey of the seignory of *Gower* and the several members thereof, begun the 27th of August, 1650, by *Bussey Mansel* and *John Pirie*, Esqs., and *George Billingham*, gentleman, by virtue of a commission from *Oliver Cromwell*.

27 Sept. 1686, 2 J. 2.—An original survey of the manor of *Kilvey*, by a jury of survey, being tenants of the manor, under a commission of survey from the then Duke of *Beaufort*, lord of the manor, and which survey is signed among other parties, tenants of the manor, by *T. Popkin*, and *R. Morgan*.

1764.—Survey of the seignories of *Gower* and *Kilvey* made by *G. Powell*, Esquire, steward thereof, by command of *Elizabeth*, Duchess Dowager of *Beaufort*.

8 Dec. 1750; 22 Feb. 1783.—Counterpart of lease from *Charles Noel*, Duke of *Beaufort*, to *C. Townsend*, referred to in the Comptroller's bill.

Not ordered to be produced.

24 Feb. 1305; 34 Edw. 1.—Copy translation of the charter of *William de Breons* to the town of *Swansea*.

2 Edw. 3.—Office copy charter of confirmation to *John de Mowbray* and *Olivia*, his wife, of all the land in *Gower*, with the appurtenances in *Wales*.

5 J. 1.—Office copy grant to *Edward*, Earl of *Worcester*, of certain liberties.

29 C. 2.—Exemplification of the grant of 5 J. 1.

23 Feb. 1702.—A case submitted by the Duke of *Beaufort* as to his right of action against the then tenant and late lessees of the said payment of 4d. per wey for rent accruing after the expiration of his lease, and the opinion of *Mr. Dobyns* thereon.

2 Feb. 15 C. 2, 1664.—Original and counterpart indenture of lease from *R. Raworth*, and *R. Cox*, Esquires, of the first part; *Edward*, Earl and Marquis of *Worcester*, and *Henry Lord Herbert*, his son and heir-apparent, of the second part; and *T. Williams*, of *Swansea*, merchant, of the third part, being a demise of the said 4d. per weight of coals, wrought within the manors of *Kilvey*, and thence exported over the bar of *Swansea*, to hold for twenty-one years at a yearly rent of 12l. and one couple of fat capons.

20 July, 27 C. 2, 1675.—Counterpart indenture of lease from *Henry*, Marquis of *Worcester*, of the one part, and *D. Evans*, of the other part, being a demise of the said 4d. per weight, due and payable for every weight of coals wrought within the lordship of *Kilvey*, and from thence exported over the bar of *Swansea*, to hold for twenty one years at the yearly rent of 12l. and two fat capons.

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2 Nov. 1743.—Indenture between *Henry, Duke of Beaufort*, of the one part, and the Hon. *Bussey Mansel*, of the other part.

22 Feb. 1783.—Counterpart of lease between *Henry, Duke of Beaufort*, of the one part, and Lord *Vernon*, of the other part, referred to in the Complainant's bill.

18 and 19 May, 1810.—Original lease from *C. H. Smith*, of the one part, and *Henry Charles, Duke of Beaufort*, of the other part.

1 Mar. 1827.—Counterpart indenture of lease between *Henry Charles, Duke of Beaufort*, and the present Duke, (then Marquis of *Worcester*), of the one part, and *G. Tennant*, Esquire of the other part.

Cases and opinions of counsel thereon, being all of them subsequent in date to the refusal of the Complainant to pay the 4*d.* per weigh in question, and with a view to proceedings taken or to be taken against the Complainant for recovering the said payment.

No application was made for liberty to seal up such parts of the above documents as did not relate to the matters mentioned in the bill. Nor did the Defendant avail himself of the offer made by the Court to shew by affidavit, that any particular documents ought not to be produced.

The Defendant moved, before the *Lord Chancellor*, to discharge the order for production. *Vide infra*.

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On a motion for the production of documents, a survey or valuation of the property to which the question in the cause related, described by the Defendant as consisting of his evidence, and supporting his case, and not that of the Plaintiff, and made with a view to the defence in the suit,—was considered as a minute furnished by a witness of the evidence he would give, and as such, it was held, that the Plaintiff was not entitled to the production of it.

Semble, on a motion to produce documents, the affidavit of the Defendant is admissible to shew that the documents are within any ground upon which the Defendant is entitled to withhold the production.

THE Plaintiff contracted to purchase from the Defendants, the trustees of the will of the late Sir *William Garrow*, an estate for the sum of 7444*l.*, and the bill was filed for the specific performance of the contract. The bill alleged that the said price was an adequate consideration for the property, anticipating an objection to the contract on the ground of value. And it contained the common charge, that the Defendants had in their possession books and docu-

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ments relating to the matters mentioned in the bill. The answer admitted the possession of the documents which were described in the schedule relating to the matters in question in the cause, and, a motion was now made for their production.

[*528] *The Defendants opposed the motion, and tendered an affidavit, made by one of the Defendants, stating that the original deeds mentioned in the schedule no otherwise related to the cause of complaint than by relating to the title to the estate in question; that the same documents related to other estates of the late Sir *W. Garrow*, and the Defendants were under covenants to produce them to purchasers of different parts, and that some of the estates were still in progress of sale (a): that some of the letters (not specifying which) consisted of correspondence carried on between one of the Defendants and his father, another of the Defendants and his wife, Sir *W. Garrow*, his solicitors, and several other persons, before and after the institution of the suit,—that the same was generally of a private and confidential nature, and that the same did not in any way support the Plaintiff's case, but tended to support the case of the Defendants, the trustees: that in consequence of the alleged contract for the sale of the said estate for the sum of 7444*l.*, and another person having made a subsequent offer of 10,000*l.*, the Defendants, the trustees, after the dispute had arisen between them and the Plaintiff, with the view of ascertaining the real value of the said estate, and of resisting the bill for a specific performance which the Plaintiff had threatened to file, caused the said estate to be valued by a surveyor, who accordingly surveyed and valued the estate, and his report, dated 11th of February, 1841, was comprised in the schedule, and formed part of the evidence of the Defendants, the trustees, in support of their case, and the same did not support the Plaintiff's case, and ought not to be produced for his inspection.

Mr. *Lloyd*, for the motion.—The Defendants have not
[*529] by their answer suggested any ground upon which the documents described in the schedule and relating to the

(a) These deeds were not ordered to be produced.

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matters in question should be withheld, and, therefore, upon the answer the Plaintiff is entitled to the production of all the documents. The surveyor's valuation does not fall within the class of privileged communications, *Tyler v. Drayton* (a); *Storey v. Lord George Lennox* (b); *Greenlaw v. King* (c); *Whitbread v. Gurney* (d); *Preston v. Carr* (e). Affidavits have in some cases been received to supply an imperfect description of a document, but they are not admissible to introduce an additional statement of circumstances. Such a course would be in fact an indirect mode of filing a supplemental answer, which is never permitted without great caution and jealousy.

Mr. Lewin, for the Defendants.—It is the settled practice to receive affidavits shewing grounds upon which documents ought not to be produced. The protection of documents is a matter wholly collateral to the question in the cause, and it is, therefore, a point to which the defendant may well be supposed not to advert in framing his defence to the suit. The reception of the affidavit for this purpose is distinguishable from the case of a supplemental answer; *Hughes v. Biddulph* (g); *Parsons v. Robertson* (h); *Curd v. Curd* (i). The surveyor's valuation is plainly, from its nature, part of the evidence by which the Defendant's case is to be supported, and the Plaintiff is not entitled to inspect the evidence of the Defendants before the trial. *Tyler v. Drayton* (k); *Mickelthwaite v. Moore* (l).

*VICE-CHANCELLOR :—

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The Plaintiff moves for the production of documents, which the Defendants admit that they have in their possession, relevant to the matters mentioned in the bill; and in answer to this motion an affidavit is made by one of the Defendants, for the purpose of shewing that the documents are of such a character that the Court will not order them to be produced. The Plaintiff contends, first, that the affidavit cannot be received; and secondly, that, if received, it

(a) 2 Sim. & St. 309.

(c) 1 Beav. 137.

(g) 4 Russ. 190.

(k) 2 Sim. & St. 309.

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(b) 1 Keen, 341; S. C. 1 My. & C. 525.

(d) 1 You. 541.

(h) 2 Keen, 605.

(l) 3 Mer. 292.

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(e) 1 You. & J. 175.

(i) Ante, p. 274.

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is insufficient for the intended purpose, and that the deficiency cannot be supplied.

If the first point were new, I should strongly incline to adopt the Plaintiff's argument. I cannot understand why a defendant should not be held bound to put his whole case upon his answer, or why he should be allowed to occasion expense, and perhaps delay, by making a case supplemental to his answer by affidavit, unless the matter of the affidavit was newly discovered, or other special grounds for receiving further evidence were shewn. But the point is not new, and I consider myself bound by authority upon it. I believe that authority may be found for allowing an affidavit to be filed in opposition to a motion of this nature applicable to almost every ground which can successfully be urged against the production of such documents. In *Tyler v. Drayton* (a), Sir J. Leach says, that a defendant is bound to produce all documents admitted to be in his possession relating to the matters in question, "unless it appears by the description of any particular instrument in the schedule, or by affidavit, that it was evidence, not of the title of the plaintiff, but of the defendant, or that the plaintiff had otherwise no interest in its production." In *Hughes*

v. *Biddulph* (b), the defendant resisted the production
 . [*531] of the documents upon the ground of their being privileged as professional communications, and he was allowed to distinguish them by affidavit. In *Parsons v. Robertson* (c), the same question arose, and was dealt with in the same way. In *Morrice v. Swaby* (d), the defendant resisted the order for production upon the ground that the possession of the party who held the documents was not the defendant's possession. The Master of the Rolls thought otherwise upon the answer alone, but admitted an affidavit to explain the case. In *Curd v. Curd* (e), I allowed the defendant to shew by affidavit that particular parts of the documents in the answer were not relevant, and my decision was confirmed on appeal.

(a) 2 Sim. & St. 309.

(b) 4 Russ. 190.

(c) 2 Keen, 605.

(d) 2 Beav. 500.

(e) Ante, p. 274.

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In the case of *Hughes v. Biddulph*, *Morrice v. Swaby*, and *Curd v. Curd*, the affidavit was not filed at the time the motion was made, which I notice, because the present affidavit is not sufficient to protect the letters alleged to be privileged; and if there are grounds of protection, they must be shewn by another affidavit which I shall permit the Defendants to make. All the letters in the schedule must be produced, except those which the Defendants can shew are entitled to protection under an order, as in *Hughes v. Biddulph*.

With respect to the valuation, it is certainly not evidence of the Defendants' case, for it is not evidence at all; but it is a minute of the evidence which the Defendants have procured since the dispute in the cause arose, for the purposes of their defence in the cause, and I think it is protected. *Curling v. Perring* (a); *Preston v. Carr* (b): the latter case goes much further.

*My decision, in this case, does not conflict with the [*532] decisions in *Whitbread v. Gurney* (c), *Storey v. Lord George Lennox* (d), or *Greenlaw v. King* (e). Those cases decided that it is not every document which has come into existence since the dispute commenced, having reference to the dispute, that is necessarily privileged only because it might disclose the evidence to be given on the part of the defendants. Undoubtedly, there are many documents of which all this might be truly stated, and which notwithstanding would not be privileged. But I think such documents may be privileged without calling in aid the doctrine of professional confidence. The point which I decide in this case was expressly saved by Lord *Cottenham* in *Storey v. Lord George Lennox*, but is, I think, sufficiently authorized by the cases I have referred to, and is a decision called for by the nature of the case. I could not order the production of this document, without deciding that a plaintiff may require a discovery from the defendant of the particulars of the evidence to be given by each of his witnesses, except so far as he could shew that his knowledge upon the subject was derived exclusively from his solicitor,—a decision which it would be diffi-

(a) 2 Myl. & K. 380.

(b) 1 You. & J. 175.

(c) 1 Younge, 541.]

(d) 1 Keen, 341; S. C. 1 My. & C. 525.

(e) 1 Beav. 137.

 1842.—Sampson v. Pattison.

cult to reconcile with the principle, that each party has a right to know his opponent's case, but not the evidence by which that case is to be supported. I consider the valuation as being a minute furnished by a witness of the evidence he will give; and the defendant pledges his oath that it consists of his evidence, and supports the averment he has made in his answer. I give no opinion as to what the proper decision in this case would have been, if the Plaintiff, by probing the conscience of the Defendants, had elicited from them an admission that the valuation in question negatived the [*583] Defendants' case. I *decide only, that, upon the evidence now before me, this particular document stands in the same situation as those which relate exclusively to the Defendants' case: *Bolton v. Corporation of Liverpool* (a). My impression, during the argument of *Storey v. Lord George Lennox*, was, that Lord *Cottenham* considered the privilege of a document, in a case like this, to depend, in principle, upon the purpose for which, and the circumstances under which, it was obtained, and not exclusively upon the character of the person who might actually obtain it (b). The reasoning of Lord *Brougham*, in *Bolton v. The Corporation of Liverpool*, and of some of Lord *Langdale's* remarks in *Greenlaw v. King*, tend to the same conclusion, or, at least, leave it clearly open.

 SAMPSON v. PATTISON.

1842; May 27 and 28:—June 11.

A conveyance of an estate to A., in trust that the same should stand chargeable with a sum of money and interest, and subject thereto in trust for B., with a power of sale by A., upon non-payment, after notice, is not a mortgage entitling A. to bring his bill for foreclosure, but it entitles him to the aid of the Court in effecting a sale.

THE bill stated, that, in October, 1822, *E. Williams*, and others,

(a) 1 Myl. & K. 33.

(b) See Points on the Law of Discovery, p. 255, ed. 2.

1842.—*Sampson v. Pattison.*

conveyed certain premises in or near Crownstreet, Soho, described as the church and fabric of a church, and the burying-ground thereto belonging, and the messuage or chapel-house adjoining and in front thereof, and the several sites, rights, members, and appurtenances, to *S. Knight*, and other persons, to the use of *J. Arundel*, his heirs and assigns, upon trust that the same premises should stand and be charged and chargeable with and subject to the payment to the said *James Arundel*, his executors, administrators, and assigns, for his and their own use and benefit, of the sum of 1,500*l.*, "together with interest thereon after the ['584] rate of 5*l.* per cent. per annum from the date of the indenture, and subject thereto, in trust for *Anthony Pattison*, and others therein named, their heirs and assigns, for ever; and that in the same indenture was a proviso, that, if the said 1,500*l.* and interest should not be paid within two months after notice requiring the same should be given as therein mentioned, then it should be lawful for the said *J. Arundel* to sell the said premises, and he was thereby empowered to give effectual receipts for the purchase-money; that, by subsequent indenture therein mentioned, the said 1,500*l.* and interest secured by the first indenture, were assigned to the Plaintiffs upon certain trusts; that the equity of redemption of the premises by divers conveyances became vested in the Defendants, *A. Pattison*, *W. Borders*, *T. Carman*, *J. Hill*, and others; that, in August, 1841, notice requiring payment of the 1,500*l.* and interest was given, but the same had not been paid; and that the Plaintiffs had endeavoured in vain to sell the premises in pursuance of the power, and had incurred costs thereby. The bill prayed, that an account might be taken of what was due on the security, and that the Defendants might be decreed to pay the same or be foreclosed, and for general relief.

The Defendants, *W. Borders*, *T. Carman*, and *J. Hill*, demurred for want of equity.

Mr. *Girdlestone* and Mr. *Hetherington*, in support of the de-

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murrer, said that there was nothing in the instruments, under which the charge was created, to entitle the Plaintiffs to a decree of foreclosure as the alternative of payment. The mode of recovering payment was expressed in the contract, and the case had [*535] no *resemblance to that out of which the title to foreclosure arises.

• Mr. *Willcock*, for the Plaintiffs.

The charge in question is a mortgage in a form which is not uncommon; and there is no reason for excluding the incidents of a mortgage, of which foreclosure is one. Every mortgagee is, in fact, a trustee in equity after his debt is paid. The construction of the contract is purely technical, which would distinguish the effect of a mortgage in the present form from that of a mortgage in the more common form of an absolute conveyance, without an express declaration of trust of the surplus. There is substantially no difference in the two cases. At all events, the Plaintiffs are entitled to the assistance of the Court in carrying into effect the trust for sale; and the demurrer, therefore, denying their title to any relief, cannot be sustained.

Mr. *Girdlestone*, in reply.

A sale is not prayed by the bill, nor is it pointed at, so as to be brought within the prayer for general relief. The aid of the Court moreover is not necessary in order that the Plaintiffs might sell.

The cases mentioned were *Palk v. Lord Clinton* (a), and *Teulon v. Curtis* (b).

VICE-CHANCELLOR ;—

The only question is,—what are the terms of the contract? They are, simply, that a certain sum of money and interest shall be a

(a) 12 Ves. 48.

(b) 1 Younge, 610.

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charge on the estate, and if the same be not paid at a particular time, the party entitled to the money shall have power to sell the estate. There is no right of foreclosure arising out of such a contract. *Where a charge is created by mort- [*536] gage, the condition of which is, that if the money be not paid at a certain day, the estate of the mortgagee shall be absolute at law, this Court says that the failure in payment at the day shall not work a forfeiture, notwithstanding the express words of the contract ; and upon the bill of the mortgagee, a further time for payment is appointed : if the money be not then paid, the Court refuses again to interfere, and leaves the parties to their legal rights. The frame of the instruments under which the parties claim, in this case, do not bring them in any respect within the principle that the decree of foreclosure proceeds upon.

The form of the security points out the manner in which the trust is to be worked out, and payment obtained. Notice requiring payment is to be given in a particular manner, and after a certain time, if payment is not made, the trustee may sell the estate. I think the trustee is entitled to the aid of the Court in carrying into effect the sale ; but if that aid should be sought unnecessarily, the propriety of the suit may be considered hereafter in disposing of the costs. If the bill distinctly averred that the Plaintiffs had given the notice in due form, and thus taken the steps required in order to enable them to sell, the demurrer, extending to all relief, might be overruled ; but I should certainly overrule it without costs, for the bill obviously pointed the attention of the Defendants to relief by way of foreclosure only. The bill does not, however, distinctly shew that the Plaintiffs have pursued their remedy *modo et forma* by giving the proper notice, and that they are in a condition to effect a sale ; but on this point I think the Plaintiffs should have leave to amend their bill.

The Plaintiffs consented that the demurrer should be allowed, without costs, they having liberty to amend the bill by stating the due service of the proper notice.

1842.—*Adams v. Adams.*

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*ADAMS v. ADAMS.

1842: May 27, 28.

A devise and bequest of real and personal estate upon trust for the children of the testator, subject to the dower and thirds at common law of his wife, followed by a direction to apply the rents, issues, and profits, after deducting the dower and thirds of his wife, to the maintenance of the children, is not, by implication, a gift of any interest in the estate to the wife.

E. B. ADAMS, by his will, dated in 1826, directed that all his just debts, funeral and testamentary expenses, should be fully paid and satisfied, and, from and after payment and satisfaction of the same, gave, devised, and bequeathed all and every his (the testator's) freehold and copyhold manors, messuages, lands, tenements, and hereditaments, situate in the county of Suffolk, or elsewhere, in the kingdom of England, and all and every other his the said testator's real and personal estate whatsoever and wheresoever, of what nature and kind soever, of which he might die seised or possessed of or interested in or entitled to in any manner at the time of his death, unto trustees and the survivor of them, and the heirs, executors, administrators, and assigns of such survivor respectively, according to the nature of the testator's estate therein, upon trust (but subject nevertheless to the dower and thirds at common law of the said testator's wife, *Jane Adams*, in and out of his real estates, and as to such of his real estates subject to the payment of, and chargeable with, all principal sums of money, and the interest thereon arising, which he had already charged, or should at any time thereafter charge, by mortgage or otherwise) to receive the rents, issues, and profits thereof, and to pay the same or the overplus thereof, after deducting the dower or thirds of his said wife, *Jane Adams*, therein, and such interest as might be due and payable for the sums of money, with which the said real estates might be charged at his decease, towards the maintenance, education, and bringing up of

[*538] all and every such children as he might have at the time of his decease, until the youngest of such children should attain twenty-one, in equal shares, and then upon trust to sell

 1842.—*Adams v. Adams.*

the said real estates, and divide the monies to arise thereby amongst such children. The testator appointed the said *Jane Adams*, his wife, executrix, and died, leaving her, and the Plaintiffs, his children, surviving. The bill was filed against the widow, the trustees, and heir-at-law to establish the will, and carry into effect the trusts. The widow afterwards married the Defendant, *Holmes*, against whom a supplemental bill was filed.

By the decree made in August, 1839, the will was established, and the usual accounts of the personal estate, and inquiries concerning the children of the testator were directed. And the Master was directed to inquire whether the Defendant, *Jane Adams*, the widow of the testator, was legally entitled to dower out of any and which of the estates whereof the testator died seised; but such inquiry was not to prejudice the question of election.

The Master, by his report, found that *E. Burman*, being seised of an estate of inheritance in fee-simple of and in an estate situate in the parish of Bures and Weston in Suffolk, by his will, dated the 26th of February, 1801, devised the same unto *T. Ingram*, *J. Warner*, *B. Adams*, and *E. Adams*, and their heirs, to the use of *J. Warner* for life, with remainder to the use of trustees during the life of *J. Warner*, to preserve contingent remainders; remainder to the first and other sons of *J. Warner* in tail male; remainder to the use of *B. Adams* for life, with remainder to the use of trustees to preserve contingent remainders; remainder to the first and other sons of *B. Adams* in tail male; and he found [*539] that the testator *E. Burman* died some time in the year 1803, without revoking his will; and that *B. Adams* and the testator, *E. B. Adams*, the first and eldest son of the said *B. Adams*, before the death of the said *J. Warner*, the preceding tenant for life, by indentures of lease and release, dated the 1st and 2nd days of October, 1818, and, by a fine sur conusance de droit come ceo &c., mortgaged their expectancies in the said estate and premises in Suffolk to *C. M. Wentworth*, for securing the payment of a sum of 1,750*l.*, and interest at 5*l.* per cent.; and he found that *B. Adams*

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died in December, 1821, leaving the testator *E. B. Adams*, his first and eldest son, surviving; and that *J. Warner* died in July, 1823, without issue, and thereupon the said testator *E. B. Adams* became entitled as tenant in tail male to the said estates; and he found that the testator, *E. B. Adams*, was married to the Defendant *Jane Holmes*, late *J. Adams*, the 10th of August, 1820, and that he died on the 26th of March, 1833, leaving the Defendant *Jane Holmes*, his widow, him surviving; and, upon due consideration of the facts aforesaid, he was of opinion, that the said Defendant *Jane Holmes*, the widow of the testator *E. B. Adams*, was not legally entitled to dower out of the estates so devised as aforesaid, or any part thereof.

The cause came on for further directions.

Mr. *Sharpe* and Mr. *Jemmett*, for the Plaintiffs, said, that there was no gift by implication to the widow. The estate was disposed of by the will, subject only to such charges as it might be chargeable with; and the title of the widow to her dower depended on the question of whether it was liable to that claim or not in [*540] dependently* of the will: *Wright v. Wyvell* (a); *Dashwood v. Peyton* (b); *Davis v. Davis* (c); *Jarman on Wills* (d); *Bird v. Hunsdon* (e); *Crowder v. Clowes*. (g)

Mr. *Bird*, for the heir-at-law, mentioned *Tilley v. Tilley* (h).

Mr. *Girdlestone* and Mr. *Sandys*, for the widow of the testator, and her husband, contended that the words of the will amounted to a gift by implication to the widow. They cited *Tilley v. Collyer* (i).

VICE-CHANCELLOR :—

I certainly think that this is a hard case upon the widow; but, whatever my opinion in that respect may be, I cannot make a provi-

(a) 2 Vent. 56.

(b) 18 Ves. 27.

(c) 1 R. & Myl. 645.

(d) Vol. 1, p. 460.

(e) 2 Swans. 342.

(g) 2 Ves. jun. 449.

(h) Cited by Lord *Eldon*, in *Dashwood v. Peyton*, 18 Ves. 43.

(i) 3 Keb. 589.

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sion for her, which the testator has not directed. The question in all these cases is, whether the testator has actually made any gift; and the gift, if there be any, must be found either in express words or by implication. Where a testator, in one part of his will, has recited that he had given a legacy to a certain person, but it has not appeared that any such legacy was given, the Court has taken the recital as conclusive evidence of an intention to give by the will, and, fastening upon it, has given to the erroneous recital the effect of an actual gift. Where, however, the testator says that only which amounts to a declaration, that he supposes that a party who is referred to has an interest independent of the will,—such a recital is no evidence of an intention to give by the will, [*541] and cannot be treated as a gift by implication. The distinction between the two cases is marked and obvious. In the former, the erroneous recital is evidence of an intention to give by the will, inadvertently not expressed. In the latter, as it is expressed by Mr. *Jarman* (a), “such recitals do not in general amount to a devise; for, as the testator evidently conceives that the person referred to possesses a title independently of his own, he does not intend to make an actual disposition in favour of such person.” I cannot distinguish the case before me, in principle, from those I have referred to.

The probability in this case no doubt is, that the testator intended his widow should have a provision; but there is nothing upon the will, though aided in construction by the fact, that the widow was not entitled to dower out of any lands, which can enable the Court to give effect to such an intention, if it really existed. A devise of property, subject to a certain debt or charge which the testator thought that a stranger had upon it, where in fact there was no such debt or charge upon the estate, would afford no necessary implication that the testator intended a gift to a stranger of the amount of the assumed debt. In this case, the devise is, after deducting the dower or thirds of his wife at common law; but I cannot, from the relationship of the parties only, give effect to a supposed intention, of which

(a) *Jarman on Wills*, Vol. I, p. 460.

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I could not even infer the existence, as between strangers ; and there is nothing else to distinguish the two cases.

It occurred to me, for a moment, that the inquiries which the Court had directed as to the widow's right of dower, and [*542] the answer to those inquiries,—that the *widow was not legally entitled to any dower,—might justify me in giving the will a different interpretation. But I am satisfied I cannot do so. The object of the reference was to enable the Court to give the widow what, if any thing, she might be entitled to as dower at common law. At least, the decree is satisfied by so interpreting it, without supposing the Court to have intended that, if the widow was entitled to no dower, the Court would give her a portion of the rents equal in amount to what dower would have given her out of the whole estate. Such an intention in the mind of the Court, if it existed, could not, in my opinion, have been effectuated consistently with any principle of law. First, it supposes an implied gift, of which, for the reasons already stated, I think there is no evidence. Secondly, it supposes the Court may create a subject, which has no existence for the purpose of satisfying a defective gift. This it cannot do. Where a testator uses words which do not accurately apply to any existing subject, but do with sufficient certainty identify a given subject, the Court may apply the inaccurate words of the will to the subject so identified by them ; but it cannot call a subject into existence for the purpose of making the will operative. In this case, the will must be inoperative, unless the Court creates a rent-charge equal to the amount of the widow's dower at common law. The words "after deducting" can have no operation ; for the deduction is to be of that which does not exist.

It is stated, that the children are nearly of an age, at which it will be in their power voluntarily to supply that provision for the widow out of the estate, which the testator may be reasonably presumed to have intended. It will be for them to determine what they will do in such a case ; but I cannot construe the will as giving to the widow any interest in the estate.

1842.—Hawkins v. Hawkins.

*HAWKINS v. HAWKINS.

[*543]

1842: June 22, 23.

The Court will neither decide a question between a class of persons and a party claiming adversely to that class, nor decree the distribution of a fund amongst a class of persons,—without evidence that all the members of such class are parties to the proceeding.

Whether, in the case of a claim made adversely to a class of persons, the mode of proving that all the members of the class are parties, is necessarily by inquiry before the Master—*Quere*.

THE object of the suit was to carry into effect the trusts of the will of a testator, who died in 1819, and to determine who were the parties entitled to an accumulated fund, forming part of the residuary bequest in the same will. The Plaintiff was the trustee. Two classes of persons were principally interested in the question—first, the children of the Plaintiff; and, secondly, his grandchildren. The Plaintiff stated, by his bill, that all his children, and his grandchildren, were Defendants to the bill, and all the Defendants, among whom was the father of the grandchildren, admitted that all the children and grandchildren were parties.

At the hearing of the cause, it did not appear that there was any report of the state of the family, shewing that all parties interested in the question were before the Court.

Mr. Rolt, for the Plaintiff.

The statements and admissions of all the parties in the cause exclude all doubt that children and grandchildren of the Plaintiff, comprehending both classes of claimants, are parties to the suit. The interests of each class are, therefore, substantially represented for the purposes of the argument. The Court will also take the statements of the parents of each class of claimants, that all their respective children are present, as evidence of that fact, at least for the purpose of determining the construction of the gift, in which they are supposed to be interested, although the Court might require more satisfactory proof of the fact before distributing

 1842.—Hawkins v. Hawkins

[*544] *the fund among such of them as should be found entitled to it. The *Master of the Rolls* had recently acted upon that distinction in a case of *Arthur v. Hughes*. He cited also *Caldecott v. Caldecott* (a).

Mr. *Sharpe*, Mr. *Teed*, Mr. *Romilly*, and Mr. *Craig*, appeared for other parties.

THE VICE-CHANCELLOR said it was impossible there could be such a rule of practice as that which was suggested ; for it was equivalent to saying that the Court would, if it decided against the interest of a class of persons, distribute the whole fund in dispute, without ever inquiring whether the persons composing the excluded class were present to protect their own interests ; whilst, on the other hand, if the Court came to a decision in favour of that class it would refuse to distribute any part of the fund until after inquiry of whom the class was composed. Lord *Cottenham* had invariably followed a different principle (b).

VICE-CHANCELLOR :—

I have taken occasion to mention to the *Master of the Rolls* the point which has been pressed in this case ; and I am informed that no new rule of practice on this subject has been either laid down or adopted by him, although, in one case, under peculiar circumstances, in which his Lordship thought he might safely do it, he decided a question between a class of persons, and a party claiming against them, without previous inquiry before the Master whether

[*545] the class was fully before him. The **Master of the Rolls*, in that case, acted upon the authority of the reported case of *Caldecott v. Culdecott* (c). The practice of Lord *Cottenham* was directly the reverse of that which he is represented as having sanctioned in that case ; and, indeed, a contrary rule is ex-

(a) 1 Cr. & Ph. 183.

(b) See *Daniel v. Dudley*, 11 Sim. 177.

(c) 1 Cr. & Ph. 168.

 1842.—*Hawkins v. Hawkins.*

pressed by the same learned Judge in *Shuttleworth v. Howarth* (a). I have caused reference to be made to the minute-book of the registrar with respect to *Caldecott v. Caldecott*; and the note made by the registrar does not correspond with the report (b). It appears to have been stated, at the hearing, that all the parties who claimed to be interested were in truth before the Court; and the attention of Lord *Cottenham* might not have been attracted to the circumstance, that the presence of the next of kin was not shewn by evidence. From my own recollection of the case, I know it was represented as of great importance to the parties, that the opinion of the Court should be speedily obtained,—the departure of the plaintiff for India depending upon the decision. The cause was certainly heard, and the bill dismissed as against the next of kin; but I am satisfied that the report does not accurately represent the judgment of the Court upon this point: it is possible that the admissions in that case might have been treated at the bar as evidence that the next of kin were parties; but Lord *Cottenham* could not have said that their rights might be adjudicated upon in their absence.

*The general rule of this Court is, that all persons interested in the subject of a suit must be parties, except [*546] where their numbers are so great as to render the application of the rule highly inconvenient or impracticable. And therefore, where the interests of a class, as of the children or next of kin of a particular person, is concerned, the whole of those who constitute the class must be parties, and the Court must be satisfied, by evidence of some kind, that they are so. It is admitted, that, in the case of the distribution of a fund, all the parties entitled to it must be present; and that, at least as a general rule, the mode of proving that

(a) *Id.* 230.

(c) By the minute-book it appeared, that *Caldecott v. Caldecott* came on for hearing before the Lord Chancellor, December 18th, 1840: the following is an extract from the Registrar's note of the cause on that day. "Lord Chancellor:—The plaintiffs may amend their bill and bring all the proper parties before the Court, &c." The cause came on again February 5th, 1841, when the Registrar notices, that Mr. *J. Parker* with Mr. *Richards*, for the Plaintiffs, stated—"All parties who claim as next of kin are now before the Court." The cause was heard and the decree made February 6th, 1841.

 1842.—*Roberts v. Marchant.*

they are present, is by inquiry before the Master. Whether the same mode of proof is invariably required when the question is between the class, and one claiming adversely to the class, I am not called upon now to decide. It is sufficient, for the present case, to say that some proof of the fact, that the parties interested are before the Court, is necessary.

In respect of the practical necessity of the rule, I cannot see that there is any difference between a case calling for a declaration of right to a fund,—which is not made unless it is to have some effect, or the distribution of a fund, which is sought to be made adversely to a class,—and the case of members of that class seeking distribution amongst themselves. A reason that the Court requires more than the mere statement of the parties themselves, that all the members of the class are before the Court, is, that, if that statement were deemed sufficient, a fraudulent agreement might be made between some parties to the exclusion or injury of others.

Inquiries of the persons who composed the several classes interested, were directed.

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ROBERTS v. MARCHANT.

April: April 22, 23.

The heir-at-law of the vender of real estate is a necessary party to a suit by the administrator of the vendor against the purchaser for specific performance of the contract.

THE administrator of a vendor, who had died intestate, filed his bill against the purchaser for a specific performance of a contract for the sale of land. The contract of sale contained a proviso, that if the purchase was not completed by a given day, unless the same was delayed owing to a bona fide objection to the title, the vendor, her heirs and assigns, should be at liberty to rescind the agreement. The legal estate of the property contracted to be sold was in a trust

1842.—*Roberts v. Marchant.*

tee for the vendor. The purchaser, by his answer, objected that the heir-at-law of the vendor was a necessary party. The cause was set down, upon the petition of the Plaintiff, under the Order XXXIX, of August, 1841, on the objection for want of parties.

Mr. *Tripp*, for the Defendant.

The heir is entitled to know whether there is a valid contract for sale, whereby his title is excluded. Under certain circumstances, moreover, the heir, in the present case, would be entitled to rescind the contract; and as no decree made in the absence of the heir would bind him, the purchaser might be ordered to take the estate in one suit, and have the sale rescinded in another. On the doctrine of mutuality (a), inasmuch as the purchaser could not have filed his bill without making the heir a party, it is reasonable that he should be a party to a suit against the purchaser : *Shadforth v. Temple*(b).

Mr. *Wakefield* and Mr. *Rogers*, for the Plaintiff.

The Defendant does not dispute the validity of the *con- [*548] tract, and therefore the objection which rests on the suggestion that the heir might rescind it, has no foundation on any fact alleged or existing in the cause. It is apparent, from the facts which are stated, that the circumstances did not occur which would have given the heir the right of rescinding the contract. The heir cannot have any benefit of the contract: he is a stranger to it, and the purchase-money goes to the administrator. The heir, in this case, has not even the legal estate, for the vendor died entitled to an equitable interest only, which was the subject of the present contract: *Harris v. Ingledew* (c); *Humphreys v. Hollis* (d); *Tasker v. Small* (e); 1 *Sugd. Vend. & Pur.* p. 869, 870, ed. 9.

(a) See observations on the mutuality of contracts, *ante*, p. 34.

(b) 10 Sim. 184.

(c) 3 P. Wms. 41.

(d) Jac. 73.

(e) 3 Myl. & Cr. 63.

 1842.—*Langton v. Horton.*

VICE-CHANCELLOR ;—

The purchaser, when he is sued for the specific performance of his contract, is entitled to have the question of the validity of that contract decided (if it is to be decided) in the presence of the vendor, or, if the vendor should be dead, in the presence of all the parties who represent him: he is entitled after the death of the vendor, to the same benefit from the suit, by obtaining a decree conclusive on the question, as he would have had if the vendor were living. If the vendor had devised the estate contracted to be sold, it is plain that the suit could not have been brought without making the devisee a party (a). If the estate, instead of being devised, has been allowed to descend, it is equally necessary that the heir should be a party. The circumstance that the legal estate was outstanding in another person makes no difference; it has never been the practice for the Court in the first instance, to investigate the title, for the purpose of shewing that the legal estate is not in the heir, as a ground for proceeding with the suit in his absence. I do not mean to decide that the Court cannot in any case have regard to the state of a title as shewn upon the pleadings. But I think the Defendant's objection in this case is well taken.

The objection must be allowed.

 LANGTON v. HORTON.

1842: June 6, 7, 8, 9.

A deed of assignment by way of mortgage of a ship together with her tackle and appurtenances, and all oil, head matter, and other cargo, which might be caught or brought home in such ship, is, as against the assignor, a valid assignment in equity as well of the future cargo to be taken during the particular voyage, as of the cargo (if any) which existed at the time of the assignment.

The ship was on her voyage at the time of the assignment; the parties sent notice of the assignment to the master of the ship, and the master delivered up possession of the ship and cargo to the mortgagees, immediately after her return from

(a) See Calvert on Parties, p. 298.

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the voyage:—*Held*, that the equitable title of the mortgagees, to the cargo was perfected, and could not be defeated by a judgment creditor of the assignor, who afterwards sued out a writ of *fi. fa.*, and proceeded to take the ship and cargo in execution.

THE Defendant *G. Birnie*, being the owner of the ship *Foxhound*, (of which the Plaintiffs *J. B. Langton* and *E. Bicknell* were mortgagees), and, being also the owner of three other ships, by an indenture of the 13th of April, 1837, assigned the four ships and their several cargoes to the Plaintiffs upon trust to secure the repayment of certain sums of money then due to them from *Birnie*, together with all further advances, not exceeding 20,000*l.* in the whole. All the ships were employed in the whale fisheries in the South Seas. The debt due on the first mortgage of the *Foxhound* was paid off on her return from the fisheries, in August, 1837; and, at the request of *Birnie*, the *Foxhound* was then released from the incumbrance created by the indenture of April, 1837, which remained a charge on the other three ships exclusively; and the *Foxhound* was sent again by *Birnie* to the South Seas.

*The Plaintiffs afterwards agreed with *Birnie* to make [*550] him further advances to the amount of 5000*l.*, upon the security of a mortgage of the *Foxhound* and her cargo, and of a further charge upon the other ships and property comprised in the security for the 20,000*l.* In pursuance of this agreement, and in consideration of 5000*l.* advanced to *Birnie* by the Plaintiffs. *Birnie*, by indenture of the 2nd of March, 1838, assigned the ship *Foxhound*, then on her voyage to the South Seas, together with all and singular the masts, bowsprits, yards, and appurtenances whatsoever to the said ship belonging; and also all oil and head matter, and other cargo which might be caught or brought home in the said ship on and from her then present voyage; and also the policies of insurance therein mentioned, and all muniments, writings, and papers relating to the said ship, to the Plaintiffs, upon trust for securing to them the said sum of 5000*l.*, and the sums secured by the former mortgage: the indenture contained also a power of sale. A deed of further charge of the same date was indorsed upon the indenture of the 13th of April, 1837, whereby the said advance of 5000*l.*

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was made a charge upon the other three ships and their cargoes. The assignment and further charge were both entered on the day of their date, in the registry of ships belonging to the port of London, in the office of the collector of customs in that port. The indorsement of the assignment upon the certificate of registry kept on board the *Foxhound* was necessarily deferred until her return from the voyage, and was made on the 15th of January, 1841. *Birnie* became insolvent, and ceased to make any payments on account of the ship after June, 1838, and the Plaintiffs thenceforward made the requisite disbursements. In or about July 1838, information of the assignment was sent to the master of the ship, by letters from *Birnie* and from the Plaintiffs, acquainting him also of the arrangement which had been made for meeting the expenses of the voyage. These letters the master received whilst in the South Seas, several months after their date; and from that time he drew upon the Plaintiffs as his owners. The proceeds of the other three ships and cargoes were, on their return, applied in discharge of the incumbrances upon them but, according to the account rendered by the Plaintiffs, left a large sum still owing to them, upon the security of the indenture of April 1837, which, together with the said advance, became a charge upon the *Foxhound*, under the indenture of the 2nd of March, 1838.

The *Foxhound* arrived at the entrance of the port of London on the 7th of January, 1841. On the following day the master of the ship communicated with the Plaintiffs, and was shewn the deed of assignment, and informed by one *M' Guffie*, who had formerly been the clerk of *Birnie*, and now acted as his agent (whether with authority or not was disputed), that he (the master) was to do what the Plaintiffs directed, and that he was fully justified in giving up the ship to them. The master then, at the request of the Plaintiffs, directed the mate, who was in charge of the ship, to receive on board a ship-keeper, who accordingly on the 9th of January went on board and took possession of the *Foxhound* on behalf of the Plaintiffs. On the 12th of January the ship was brought into the Commercial Docks.

The Defendant, *Benjamin Horton*, brought his action against

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Birnie in February 1840, and on the 24th of June recovered judgment against him for 2372*l.* 15*s.* damages and costs. A writ of fieri facias was on the 11th of January, 1841, sued out on the judgment, and lodged with the sheriff of Surrey. On the 13th of January, the officer of the sheriff, in execution of the writ, took possession of the ship and cargo, then lying in the Commercial Docks.

The Plaintiffs having given the sheriff notice of the "as- [*552] signment, the sheriff under the Interpleader Acts, 1 & 2 Will. 4, c. 58, and 1 & 2 Vict. c. 45, on the 18th of January, 1841, summoned the Plaintiffs and the Defendant *Horton* before one of the judges of the Queen's Bench, to appear and state the nature and particulars of their respective claims, and maintain or relinquish the same, and abide by such order as might be made for the stay of proceedings. On the appearance of the parties to this summons, the learned Judge ordered an issue to be tried, in which the present Plaintiffs were to be plaintiffs, and *Horton* defendant, and that the sheriff should remain in possession at the expense of the Plaintiffs, until security for the amount of the levy was given.

On the 29th of January the Plaintiffs filed their bill against *Horton*, *Birnie*, and the sheriff, praying that it might be declared that the indenture of the 2nd of March, 1838, operated as a good and valid equitable assignment to the Plaintiffs of the ship *Foxhound* and the cargo obtained by her in the voyage which she was prosecuting at the date thereof, by way of security for the sums then due and owing from *Birnie* to the Plaintiffs; and that it might also be declared that the Plaintiffs were entitled to the full benefit of their said security in priority to the rights (if any) of the Defendant *Horton* as judgment creditor: and for an injunction to restrain the levy, and the prosecution of the order under the Interpleader Act; and if necessary for a receiver and an account.

The Plaintiffs moved for the injunction;—when a special order was made for the payment of 2500*l.* into Court, and the delivery of the ship and cargo to the Plaintiffs,—they keeping an account; and the bill was dismissed against the sheriff, the order directing, that the fund should not be paid out of Court without notice to him (a).

(a) See the report of the case on the motion, 3 Beav. 464.

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*The Defendant *Horton*, by his answer, insisted on his [*553] right as an execution creditor to the ship and cargo in priority to the Plaintiffs. Evidence was gone into on behalf of each party, by which, and by the pleadings, the facts in the foregoing statement appeared. The Defendant *Birnie* submitted to the claim of the Plaintiffs. The cause came on to be heard.

Mr. *Sharpe* and Mr. *Rolt*, for the Plaintiffs.

The assignment of a chattel, or other thing, which is not actually or potentially in existence at the time of the assignment, is not valid at law: *Co. Litt. (Butler)*, 265., a., n. 1; *Robinson v. M' Donnell (a)*. But an assignment of that which is the fruit of an undertaking already commenced, or of a thing which, in the ordinary course of events, will exist at a future time,—not that which by mere possibility may exist,—is valid in equity: *Curtis v. Auber (b)*; *In re Ship Warre (c)*; *Douglas v. Russell (d)*; *Metcalf v. Archbishop of York (e)*; *Gardner v. Lachlan (f)*; *Wellesley v. Wellesley (g)*.

The Plaintiffs, having taken an assignment to which the Court would give effect as against the assignor, have omitted no act which was necessary to complete their title as against other parties, and were actually in possession at the time the execution creditor attempted to acquire a title. A Court of equity, therefore, will not permit the execution to interpose and defeat the equitable right.

[*554] *They cited, also, *Leslie v. Guthrie (h)*; *Burn v. Carvalho (i)*; *Carvalho v. Burn (j)*; *Kerswill v. Bishop (k)*; and *Davenport v. Whitmore (l)*.

Mr. *Hall*, for the Defendant, *Birnie*.

(a) 5 M. & S. 228. See also the cases cited in *Meek v. Kettlewell*, ante, p. 468, on the assignment of a possibility or expectancy.

(b) 1 J. & W. 532. (c) 8 Price, 269. (d) 4 Sim. 524; S. C. 1 Myl. & K. 488.
 (e) 6 Sim. 224; S. C. 1 M. & Cr. 547. (f) 6 Sim. 414; S. C. 8 Sim. 128; and
 4 Myl. & Cr. 129. (g) 4 Myl. & Cr. 580. (h) 1 Bing. N. C. 710.
 (i) 7 Sim. 109. (j) 4 B. & A. 382. (k) 2 Cr. & Jer. 529.
 (l) 2 Myl. & Cr. 177.

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Mr. *Girdlestone* and Mr. *E. R. Adams*, for the Defendant *Horton*.

The assignment is inoperative, in so far as it related to things which were not in being at the time it was made, although it might have the effect of passing so much of the cargo as was then in existence. It is admitted, that, to this extent, the assignment is inoperative at law; and the cases in equity, which have been cited, are cases of future freight, which are quite distinct in principle from a cargo which wholly remains to be collected, and may never exist. When a voyage with goods on board is commenced, freight, although it may not be fully earned, yet has a potential existence. Supposing, however, that the assignment were valid as against *Birnie*, if no other party had intervened, yet it is then only an assignment in equity, and would require to be perfected by a lawful delivery of possession: it could not be assisted by an unlawful taking of possession: but the possession acquired by the Plaintiffs was unlawful; for the master of the ship committed a breach of duty in giving up the ship and cargo to any other person than his employer *Birnie*; and the authority of *M'Guffie*, as agent of *Birnie*, is not proved. If the ship and cargo had been delivered to *Birnie*, or his properly authorized agent, as they ought to have been, the execution creditor might immediately have attached the property in the hands of their debtor. The Court will not permit 'the Plaintiffs [*555] to obtain an advantage by the irregular and unlawful course of proceeding which was resorted to in transferring the possession.

The possession being removed out of the way, the assignment to the Plaintiffs, which is only valid in equity, will not avail them against the right of a creditor, who, by execution, acquires a legal interest in the property, the subject of the assignment. The equities of the claimants, in such a case, may be equal; but the legal title gives the superior right, against which this Court does not interfere. In *Whitworth v. Gaugain* (a), none of the facts constituting the title of the plaintiffs as equitable mortgagees were in dispute, yet Lord *Cottenham* said, that, if the bill had been framed

(a) 1 Cr. & Ph. 315.

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simply to give effect to that equitable title as against the tenant by elegit, he should have required a great deal more to satisfy him of the validity of the equity. He found the defendants "in possession of a legal title giving them a right against all persons who could not make out an equitable case (a) : " and it must be inferred, that Lord *Cottenham* referred to a case founded upon some fraud, or other ground, beyond a mere equitable assignment.

VICE-CHANCELLOR :—

The first and the substantial question in this cause, is, whether the future cargo of the *Foxhound*,—that which was the future cargo at the time of the assignment,—passed, either at law or in equity, by the assignment from *Birnie* to the Plaintiffs. I lay out of view all question as to the operation of the instrument at law, and look at the case only as a question in equity.

[*556] *Is it true, then, that a subject to be acquired after the date of a contract cannot, in equity, be claimed by a purchaser for value under that contract? It is impossible to doubt, for some purposes at least, that, by contract, an interest in a thing not in existence at the time of the contract may, in equity, become the property of a purchaser for value. The course to be taken by such purchaser to perfect his title, I do not now advert to; but cases recognising the general proposition are of common occurrence. A tenant, for example, contracts that particular things, which shall be on the property when the term of his occupation expires, shall be the property of the lessor at a certain price, or at a price to be determined in a certain manner. This, in fact, is a contract to sell property not then belonging to the vendor, and a court of equity will enforce such contracts, where they are founded on valuable consideration, and justice requires that the contract should be specifically performed. The same doctrine is applied in important cases of contracts relating to mines, where the lessee has agreed to leave engines and machinery not annexed to the freehold which

(a) *Id.* 336.

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shall be on the property at the expiration of the lease, to be paid for at a valuation. The contract applies, in terms, to implements which shall be there at the time specified; and here neither construction nor decision has confined it to those articles which were on the property at the time the lease was granted. But it is not necessary that I should refer to such cases as these; for Lord *Eldon*, in the case of the ship *Warre (a)*, and in *Curtis v. Auber (b)*, has decided all that is necessary to dispose of the present argument. Admitting that those cases are not specifically, and in terms, like the principal case, they are not of the less authority for the present purpose; for they remove the difficulty which has been raised in argument, and decide that non-existing property may be the subject of valid assignment. [*557] I will suppose the case of the owner of a ship, which is going out in ballast, proposing to borrow of another party a sum of 5000*l.* to pay the crew and furnish an outfit; and agreeing that, in consideration of the loan, the homeward cargo should be consigned to the party advancing the money. It cannot reasonably be denied, in the face of the authorities I have just referred to, that a court of equity, upon a contract so framed, would hold that the party advancing the money was, as against the owner, entitled to claim the homeward cargo. And if a party may contract for the consignment of a homeward cargo, I cannot see why he may not contract with the owner of a ship engaged in the South Sea fisheries, that the fruit of the voyage,—the whales taken, or the oil obtained,—shall be in his security for the amount of his advances. I cannot, without going in opposition to many authorities which have been cited, throw any doubt upon the point, that *Birnie*, the contracting party, would be bound by the assignment to the Plaintiffs.

The next question is, whether enough has been done to perfect the title of the Plaintiffs to the cargo.

The ship was at sea at the time the deed of assignment was made; the delivery of possession of the cargo itself was therefore, at that time, impossible, but the parties adopted another mode by which prop-

(a) 8 Price, 262, n.

(b) 1 J. & W. 526.

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erty in existing chattels may be transferred: *Irons v. Smallpiece* (a). At that time the parties could do nothing more in this country with reference to the cargo, than execute an instrument purporting to assign such interest as *Birnie* had,—send a notice of [*558] the assignment to the master of the ship,—and await the arrival of the ship and cargo. This was the course taken; and on the arrival of the ship at the port of London the Plaintiffs immediately demanded possession. *Blake*, the master, who during the voyage had been informed of the transfer of the property contracted for, was satisfied by a perusal of the deed that *Birnie* had transferred his interest, and took on himself the responsibility of delivering over possession of the ship to the Plaintiffs. If *Birnie* had been present and had authorized this delivery, it is not disputed that it would have given the Plaintiffs an undoubted right against all persons whose title arose subsequent to that delivery. But it is said, that *M^r Guffie* and the parties who were present had no authority from *Birnie* to deliver possession of the ship. If the question depended on the direct authority of *M^r Guffie* to deliver the possession, there is probability and evidence enough of that fact, at least to justify me in directing a further inquiry with regard to it. As that direct authority, however, is not proved, and is a matter in dispute, I shall lay it aside, and consider the case on the supposition that *M^r Guffie* had not direct authority to deliver up possession of the property. I suppose then only, as the fact is, that *Birnie* had executed a deed which, as between himself and the Plaintiffs, had given them a right to the cargo, had placed the deed in their possession, and absented himself. The ship arrived, and the Plaintiffs applied to the agents of *Birnie*,—his agents in this sense,—that they were in possession of the property, and held the ship on his behalf: on production of the deed which transferred the property to them, the Plaintiffs applied to *Blake* to give them possession of the ship and cargo. *Blake* took on himself the responsibility of assuming that the deed did pass the property of *Birnie* to the Plaintiffs, and gave them the possession. I am not speaking of a case in which

(a) 2 B. & A. 551.

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there was any fraud committed or any wrong done. If *Blake* had acted *erroneously, he might have made himself responsible to *Birnie* for delivering up his property to persons who were not entitled to receive it; but I am clearly of opinion that *Blake* was not ill advised when he was told he might safely deliver up the property. The original owner had bound himself to give possession of the cargo when it came, and a court of equity would have compelled him, so far as he was able, to perform that contract. The ship arrived,—the legal or original owner was absent; and, on the faith of the antecedent and still existing authority, the possession was given. [*559]

Laying out of the case for the present any right which the judgment creditor might have, it is impossible to say,—if the assignment can be good between *Birnie* and the Plaintiffs,—that enough has not been done to perfect their equitable title. In the course of the argument I suggested the case of the purchaser of an estate, who having paid his purchase-money, prevailed on the occupying tenant to give him possession, and I inquired whether equity, affirming the validity of the contract, would say that possession was unlawful, or would permit the vendor, who had received the money, to turn the purchaser out of possession. This question may be tried by that test, for though this is not in the form of a purchase, it is yet a transaction in respect of which a price was paid, for the price of the security was the money they advanced. It appears to me that, whether *M. Guffie* acted or not under the direct authority of *Birnie*, the Plaintiffs had, on the 9th of January, perfected their equitable title by lawfully clothing it with the possession of the property.

I now come to that part of the argument in which the superior right of the judgment creditor has been insisted upon.

*The general rule of law certainly is, that a judgment creditor can take in execution that which belongs to his debtor, but cannot take the property of other persons, although it may be in the possession of the debtor as trustee. I do not understand that it was argued that a judgment creditor can take in execution property of which his debtor was merely the trustee. And when this [*560]

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Court has once established that the equitable ownership may be in one person, and the legal ownership in another, the Court must interpose where it is necessary to protect the equitable ownership, and for that purpose I am not aware that the Court ever refuses its interposition. I may refer to the case of *Newlands v. Paynter* (a) as one of the latest reported instances in which its protection was resorted to, and in which Lord *Cottenham*, applying the principle against a judgment creditor in the case of personal chattels, (the furniture of a house), in the most distinct terms affirmed, that which cannot indeed be doubted is the law,—that equitable property must be protected. The cases of *Lodge v. Lyseley* (b), and *Brace v. The Duchess of Marlborough* (c), are important cases upon the same subject. And when it is once decided, that property ostensibly belonging to a debtor, but in truth held by him in trust for another, is to be protected, the question in every case must be, whether the equitable interest is in any other person than the debtor. In determining this question, the Court may often have to decide whether the equitable title to which the Court is called upon to give effect has been completed. If the asserted equitable title is not perfected, the earliest claimant, in point of time, may be postponed to a subsequent claimant whose title is equitable only,—a question which I had to consider in *Meux v. Bell* (d); and if the equitable title of the earlier claimant is incomplete, as between himself and [*561] his debtor, the later claim, even of a subsequent judgment creditor, as well as of a subsequent equitable purchaser, might perhaps in some cases prevail.

I think it right, however, to say, that I dissent from the construction put, at the bar, upon the passage attributed to Lord *Cottenham* in *Whitworth v. Gaugain* (a). The construction which in this argument it has been insisted that the passage should bear, would strike at the root of all equitable titles whatever. It would enable the creditor of a trustee to take the trust property in execution. The purchaser of an estate who had paid his purchase-money, and entered into possession under a defective conveyance, might be de-

(a) 4 Myl. & Cr. 408.

(b) 4 Sim. 75.

(c) 2 P. Wms. 491.

(d) Ante, p. 73.

(a) 1 Cr. & Ph. 836.

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feated by a judgment creditor of the vendor, whose judgment was posterior to the sale: *Lodge v. Lyseley* (a). I think that in *Whitworth v. Gaugain* Lord Cottenham intended only that which his words literally express, that he would not interfere against the judgment creditor by an interlocutory order, unless he was well satisfied of the validity of the equity to which he was called upon to give summary effect; and not that a judgment creditor, who has not contracted with specific reference to the property, can overreach a purchaser or incumbrancer who has acquired an interest in the property by contract specifically binding that property (b). The question in all such cases, I conceive, must be, who has the better right in equity to call for the legal estate or the legal possession, and I have always understood the rule to be, that if the equitable owner or incumbrancer has done enough to perfect his equitable title, he has that better right. In *Whitworth v. Gaugain*, the deposit of title-deeds was accompanied by a formal memorandum in writing, explaining the purposes of the deposit. The equitable interest of the depositary, like all other equitable interests, was liable to be *defeated by a [*562] fraudulent dealing with the legal estate. But, in that respect, all equitable interests are on a footing. How could that consideration give priority to a judgment creditor, who does not advance his money upon the security of the property? *Brace v. Duchess of Marlborough* (c).

I have made those remarks in reference to *Whitworth v. Gaugain*, only because I have been pressed, upon the assumed authority of the decision in that case, to decide the present case in favour of the judgment creditor, against a party whose title, for the present purpose, I take to be an equitable title. To any expression of opinion of Lord Cottenham, I should certainly defer; but I do not construe the observations which have been cited, as importing that Lord Cottenham entertained the opinion which the argument attributes to him.

The case of *Whitworth v. Gaugain* has, however, no application

(a) 4 Sim. 75. (b) See Gilb. Fo. Rom. p. 228; Gilb. Rep. 14, 15.

(c) 2 P. Wms. 491; Co. Litt. 232. s. n. (1); see also the stat. 1 & 2 Vict. c. 110, s. 13; Pridcaux on Judgments, p. 16, ed. 2; 2 Sug. Vend. 388, ed. 10.

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to the present case. The plaintiffs there were equitable mortgagees, and had not sought to perfect their title by obtaining actual possession. In this case, the equitable claimant acquired the actual possession of the property, even before the judgment creditor had placed the writ in the hands of the sheriff. When the judgment creditor came, he found that the person who had contracted to become the owner of the property under his supposed right, which I think was a good one in equity, had taken, and was holding possession of, the property which he sought to take. If anything could perfect an equitable title, that would do it. Whatever, therefore, the decision in *Whitworth v. Gaugain* might have been, if the cause had been

heard, I am satisfied I am not acting against it. In this [*563] case, *the purchaser or incumbrancer having, as I think, a good foundation for his title, completed it by obtaining possession; and the Court cannot give the Defendant priority over it without, in effect, saying, that a judgment creditor may take any property whatever, without regard to equitable interests.

The case of *Doe d. Coleman v. Britain* (a), and other cases similar in principle, have no direct application to the present case, but they shew that a creditor by judgment proceeding in invitum does not, in the view of a court of equity, stand in that position in which he requires or receives the same favour as a purchaser whose right is enforced through the conscience of the other party. If a person having an estate with a power of appointment charges or conveys away part of that estate, he cannot afterwards exercise the power in derogation of his own charge or conveyance. In *Skeeles v. Shearly* (b), one of the last cases on the subject, it was held, that where a creditor had recovered judgment and taken out execution against the estate of his debtor, over which the latter had a power of appointment, he might, by exercising the power, defeat the judgment altogether. As against a purchaser, he could not do that. These cases, however, are of remote application. I rely in this case on the general principle, that there having been such a contract as would in equity entitle the Plaintiffs, as against *Birnie*, to the cargo

(a) 2 B. & A. 292.

(b) 2 Sim. 155; 5 C. & Myl. & Cr. 112.

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when it arrived, and the title under that contract having been perfected by a possession lawfully taken under the deed, which there is no attempt on the part of *Birnie* to impeach, the subsequent judgment creditor cannot take that property from the Plaintiffs.

*BROWN v. PERKINS.

[*564]

1842: June 3, 7.

To a bill for an account of the dealings and transactions of a partnership, by the executors of a deceased partner, the Defendant pleaded, that, for a certain consideration, an agreement (not in writing) was entered into between the testator and himself, that all accounts between them and all claims of the testator in respect of the estate, monies, and effects of the partnership, and the debts due to and from the same, should be waived:—*Held*, that the agreement should be constructed to import that the Defendant thereby took upon himself the discharge of the partnership liabilities, but that the plea was bad, inasmuch as it did not aver, that no such liabilities still remained to be discharged.

Semble, there is no rule that a release or a stated account are the only defences which can be set up by way of plea to a bill for an account.

THE bill stated, that in March, 1836, the Defendant *W. Perkins* and *C. Brown* agreed to enter into partnership as attornies and solicitors at Merthyr Tydvil; and that by articles in writing, it was covenanted and agreed to the effect;—1. That *Brown* should be admitted a partner with *Perkins* for ten years. 2. The capital to continue the capital of *Perkins*, and all the practice, goodwill, and liens to belong to him. 4. *Perkins* to be the cashier, and all monies to be received and paid by him; and accounts kept and made out half-yearly; for the first four years and a half *Perkins* to have three-fourths of the profits, and *Brown* one-fourth, and afterwards the former two-thirds and the latter one-third. 15. The partnership to be determinable on notice by either partner, upon any breach of duty by the other as therein mentioned. 16. On dissolution of the partnership by notice from *Perkins*, or by the decree of any Court, by reason of the misconduct of *Brown*, *Brown* should not be

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at liberty, for the term of seven years after such dissolution, to act or practise as an attorney, or solicitor, or conveyancer at or within twenty miles of Merthyr Tydvil, or to act as clerk in the office of any attorney, solicitor, or conveyancer, at or within twenty miles of the same place; and *Brown* for every such act to forfeit and pay the sum of 1000*l.* to *Perkins* as stated or liquidated damages.

The bill stated, that the partnership was carried on under the articles, and during the continuance thereof *Brown* in [*565] all things acted in conformity with such articles; but that *Perkins* received monies on the partnership account which he did not duly account for, or enter in the books: that, differences arising, the partnership was, in November, 1837, dissolved by mutual consent, That by an agreement in writing made the 10th of December, 1837, it was recited that *Perkins* and *Brown* had agreed to dissolve their partnership; and that, differences having arisen between them on their respective rights and liabilities as co-partners, and touching the estate, monies and effects of the partnership, and of the debts due to and from the same, and the terms and conditions of their said dissolution, in order to put an end thereto, the parties had agreed to refer the same to the final arbitration of *G. Lisle* and *E. Stephens*, and *Perkins* and *Brown* thereby bound themselves to abide by the award of such arbitrators, and that the submission should be made a rule of Court. The bill stated that the arbitrators did not proceed in the reference, and made no award, owing to *Perkins* not having delivered the necessary accounts and papers. That considerable sums in respect of his share of the profits remained due from *Perkins* to *Brown*, and no settlement was made. That *Brown* died in 1841, having by his will appointed the Plaintiffs his executor and executrix.

The bill prayed that an account might be taken of the co-partnership dealings and transactions, and of all monies received by *Perkins* since the dissolution thereof, in respect of such partnership transactions, and that he might pay to the Plaintiffs what, upon taking such account, should appear to be due to the estate of their testator, with interests thereon, the Plaintiffs thereby offering out of the assets of the testator to pay to the Defendant what, if anything,

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should appear to be due from the joint concern on taking such accounts. The bill also prayed a receiver, and an injunction to restrain **Perkins* from collecting the monies due [*566] to the co-partnership.

The Defendant *Perkins* by plea said, that, amongst the differences and disputes which had arisen, and were depending between him and *Brown*, and which by the said agreement were referred to *Lisle* and *Stephens*, was a claim of the Defendant, as follows; that is to say, the Defendant claimed and insisted that the said partnership had been dissolved by reason of the misconduct of *Brown*, and that *Brown* was, therefore, not at liberty for the term of seven years after such dissolution to act or practise in the profession or business of an attorney, solicitor, or conveyancer, or in any other matter or thing connected therewith, in Merthyr Tydvil or within twenty miles thereof; and the Defendant averred that, after the said agreement for reference, and some time in the year 1838, *Brown*, by the said *E. Stephens* as his agent in that behalf duly authorized, and the Defendant came to an agreement, for the purpose of putting an end to the said reference and to all disputes and questions whatsoever between *Brown* and the Defendant, and it was thereby agreed that all accounts between *Brown* and this Defendant, and all claims of *Brown* in respect of the estate, money, and effects of the said co-partnership and the debts due to and from the same, should be waived, and that, in consideration thereof, *Brown* should be permitted to practise as an attorney and solicitor at Merthyr Tydvil without any further question or dispute on the part of the Defendant; that, in pursuance and performance of the said agreement, *Brown* was permitted to practise, and did practise thenceforth up to the time of his death at Merthyr Tydvil as such attorney and solicitor, without any further question or dispute on the part of the Defendant.

*On the argument of the plea,—

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Mr. *Girdlestone* and Mr. *W. M. James*, for the Defendant.

The plea avers that a certain and definite consideration actually moved from the Defendant to the testator, whereupon the accounts

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were waived, which constitutes a good bar: 1 *Vin. Abr.* 309, pl. 25, 26, 27, 28; *Longridge v. Dorville* (a); *Wilkinson v. Byers* (b); *Atles v. Backhouse* (c); *Skeate v. Beale* (d); *Naylor v. Winch* (e).—They cited also *Stracey v. Bank of England* (f), and *Sewell v. Bridge* (g).

Mr. Sharpe and Mr. Romilly, for the Plaintiffs.

The terms of the agreement alleged and pleaded are not sufficiently precise and intelligible to constitute a defence to this suit. What is the extent and meaning of the waiver? Are the accounts in respect of debts due from the partnership to be waived, leaving the testator or the Defendant liable to those debts, as between themselves? Are the accounts of monies already received and paid by the partnership only to be waived, and not the unsettled accounts; or is it to be understood that the accounts between the partnership and third persons had all been settled? What construction could be put on the agreement, which is the subject of the plea, if the Plaintiffs had sought to enforce such an agreement? The only defences which can be made by plea to a bill for an account are either a release, or an account stated. *Gilb. For. Rom.* 56, 57. It is only an instrument under seal which can be pleaded as a release; an instrument not under seal can only be pleaded as an account stated: *Beames, Pleas*, p. 221; Lord *Redesdale, Tr.* [*568] *Pl.* *p. 213, ed. 3, p. 263, ed. 4; 2 *Dan. Ch. Pr.* p. 186. And as a plea of an account stated, it must shew that the account was in writing: Lord *Redesdale, Tr. Pl.* p. 211, ed. 3, p. 259, ed. 4. If the defence cannot be set up in either of these forms, it may still be a defence, but it cannot be taken by plea; it must, if relied on, be made upon the answer. This plea is neither of a stated account, nor of a release. Nor is it a plea of accord and satisfaction, for that is not a good defence to account: *Selwyn, N. P.* p. 45; 1 *Vin. Abr. tit. Accord, B. 1*; *Bac. Abr. Account, E. 1*. The office of a plea is to reduce the cause to one

(a) 5 B. & A. 117.

(b) 1 Ad. & Ell. 106.

(c) 3 Mee. & W. 633.

(d) 3 Per. & Dav. 597.

(e) 1 S. & S. 565.

(f) 6 Bing. 754.

(g) 1 Ves. 297.

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point ; but this plea raises three distinct issues—that a question in dispute was, whether *Brown* had forfeited his right to practise in Merthyr Tydvil, that *Stephens* was the authorized agent of *Brown*,—and that *Brown* agreed to the waiver, in consideration of the first point being settled in his favour : *De Minckwitz v. Udney* (a) ; *Rowe v. Wood* (b) ; *Leonard v. Leonard* (c).

VICE-CHANCELLOR :—

One of the arguments on behalf of the Plaintiffs has been, that the alleged agreement, which is the substance of the plea, could not be made available as a defence by plea, notwithstanding that the same matter in the same words, if insisted upon by way of answer, might have constituted a bar to all the relief prayed by the bill ; and this was argued, not upon the ground, that the defence made by the plea did not reduce the question to a single point (which is the essence of a plea), but on the ground that the technical rules of pleading in equity preclude the Defendant from having the benefit of such a defence by way of plea, because the alleged agreement was not in writing. According to this argu- [*569] ment if the alleged agreement had been strictly performed by both parties, and all claims of the Plaintiffs both at law and in equity had thereby been satisfied, and if the question between the parties was reduced to a single point, and the plea in other respects good ; yet the Defendant would be compellable, at the mere will of the Plaintiffs, to go into his defence at large, by answer, subject to all the inconveniences to which that mode of defence might unnecessarily expose him.

As my judgment in this case does not require that I should express an opinion upon this reasoning, I shall abstain from saying more than that which I think due to the Defendant, that if he is dissatisfied with the ground upon which I decide this case, the point to which I have referred is not prejudiced by any opinion of mine in its favour.

(a) 16 Ves. 466.

(b) 1 J. & W. 815.

(c) 1 Ba. & Bea. 334.

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The question, upon argument of the plea, is, whether if the cause were now at the hearing, and the plea were proved as laid, I must, upon the matter of the plea alone, of necessity dismiss the bill. I say of necessity; because if it be not a necessary legal consequence, that the bill must be dismissed if the matter of the plea were true in fact, I cannot allow the plea upon argument. The allowance of the plea upon argument without more, determines that point, and leaves only the truth of the plea in question.

It was also argued on behalf of the Plaintiffs, that the agreement pleaded is of uncertain meaning: and if that were so, the plea certainly could not be sustained. It has been decided, that a plea of accord, uncertain in its foundation, is bad, even though the defendant shews a performance in certain. *Com. Dig. Accord.*

[*570] (B. 3), 2. "I should very reluctantly decide this case upon the ground that the alleged agreement is uncertain. For, although there may be some difficulty in putting a certain definite legal construction upon an agreement, which is expressed by saying "that all claims of the Plaintiff's testator in respect of the estate, money, and effects of the partnership, and the debts due to and from the partnership, should be waived;" I think the agreement may reasonably be understood as importing that the Defendant should take upon himself the payment and discharge of such (if any) partnership engagements or liabilities, as remained to be satisfied; and my judgment in this case will give the Defendant the benefit of the supposition, that such is the certain construction of the agreement pleaded.

Now, upon this supposition the Defendant might have pleaded the agreement with averments, shewing that at the time of making the agreement in question there were no engagements or liabilities of the firm undischarged, or that such (if any) engagements or liabilities of the firm as were undischarged at the date of the agreement had since been discharged, and that no such engagements or liabilities remained, in respect of which the estate of the Plaintiffs' testator could be affected. But there are no such averments. This leaves the case open to the intendment that the estate of the Plain-

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tiffs' testator may still remain liable in respect of the partnership with *Perkins*.

Now, the rule of law upon this subject I believe to be perfectly settled; namely, that an agreement or accord cannot be pleaded in bar to a claim without pleading satisfaction. *Com. Dig. Accord, (B)*. It is the performance of the thing agreed upon which constitutes the satisfaction of the plaintiff's demand; and nothing short of that can be pleaded in bar. If I were to allow the [*571] plea, I should thereby (according to the decisions) rule that the agreement pleaded was a satisfaction of the Plaintiffs' demand, whether it were performed or not. The Defendant may have the benefit of the same defence, by answer, offering to perform the agreement so far, if at all, as it may be unperformed.

Plea overruled.

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1842: May 31. June 1, 2, 9. July 12.

The fact that a party,—knowing that his name has without authority, been introduced as plaintiff by the solicitor of some of the other plaintiffs in a suit,—does not take any active steps to have his name expunged as plaintiff from the record, is not, as between that party and the solicitor, equivalent to a retainer or an adoption of the latter as his solicitor.

A party to a cause, for whose benefit, in common with others, the cause has been prosecuted, cannot avail himself of the benefit resulting from the suit discharged of the expenses of it, although he might have been made a party without his authority.

The employment of a solicitor in business relating to a trust estate, by the authority of the trustee, or of some of several cestui que trusts, gives the solicitor no lien or charge upon the trust estate, or upon the shares of the other cestui que trusts.

The lien of the solicitor upon a fund recovered in a suit which he has conducted, is confined to the costs of that particular suit; and therefore, *semble*, a solicitor who, in relation to the same estate, in which the same parties are interested, has brought an ejectment and a suit in equity, has no lien upon the fund recovered in the suit for his costs of the ejectment.

In a case which is brought on in the form of exceptions, but in which the substantial order would be the same however the exceptions may be disposed of, the Court may dispose of the case, without making any order upon the exceptions.

THIS was a rehearing of the matter of the petition of *R. W. Poole*,

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a solicitor, and of exceptions to the Master's report, upon which an order was made on the 15th of July, 1840, by the Court of Exchequer, before Mr. Baron *Alderson*, sitting in equity.

Real estates were devised upon trust for sale. The Plaintiff *Hall* was the surviving trustee; *Robert Woolley*, *Richard Woolley*, and *Jane Anna Landers*, were the original cestui que trusts: [*572] *Thomas Landers*, and the *trustees of the settlements on the first and second marriages of *Jane Anna*, his wife, and her children, were derivatively interested. Some of the estates were sold, and some of the remaining estates were under contracts for sale. The property being in this situation, in 1819, *Robert* and *Richard Woolley* retained the petitioner *Poole* as their solicitor. *Poole* having possessed himself of all the papers proceeded with the business of the trust. In 1822, *Robert Woolley's* share was assigned to *Lomas*.

Poole, under his retainer by the *Woolleys*, instituted three suits against purchasers of the estates, to enforce specific performance of their contracts; and in those suits all the parties interested in the estate were made plaintiffs. In all the causes, decrees were made with costs, against the defendants (a); and the purchase monies were paid into Court. Actions of ejectment were also brought, under the conduct of *Poole*, to recover possession of some parts of the trust estate. And *Poole* acted as solicitor in other business of the trust, not connected with any causes.

Out of these matters, in which all the cestui que trusts were interested, arose the claim of *Poole* to costs,—first, of the proceedings in equity, secondly, of the ejectments, and thirdly, of the general business of the trust, extraneous to the causes.

In prosecution of this claim, *Poole*, by his petition in the three causes, prayed that his costs in the suits in equity might be taxed, as between solicitor and client, and that his costs at law and in the general business of the trust might be ascertained; that [*573] the amount of the *two latter classes of costs, and the difference between the costs in equity, as between solicitor and client, and party and party, might be paid out of the monies

(a) See 3 Y. & Coll. 191.

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in, or to be paid into Court; that the costs, as against the *Woolleys*, might be taxed, and paid out of their shares; that the costs relating to the shares of *Landers* and wife, and their children, might be settled, and the balance paid out of their share of the same monies, after payment of the other costs out of the gross amount of such monies. On this petition an order of reference to the Master was made, under which the finding in effect was, that *Poole* had been, by retainer and adoption, the solicitor and attorney of all parties. All the cestui que trusts, except the *Woolleys*, excepted to the report. By the order of the 15th of July, 1840, made thereon, *Poole* was allowed the costs which he claimed as against the *Woolleys*, the costs of the Plaintiffs in the three causes in equity, the costs of the ejectments, and such of the costs of the general business as he could prove to have been done by the direct order of the parties to be charged; and as to those costs he was declared to be entitled to a lien on the funds in court, and on the shares of the respective parties therein (a).

Poole presented his petition of rehearing.

Mr. *Wakefield*, and Mr. *Koe*, for the Petitioner.

Mr. *Girdlestone*, Mr. *Sharpe*, and Mr. *Wilcock*, for the Respondents.

VICE-CHANCELLOR:—

It is not now in dispute that Mr. *Poole* has a personal demand for his costs against the *Woolleys*, for by them *he [*573] was unquestionably retained. But Mr. *Poole* has thought it necessary to seek another remedy, and he contends and asserts by his petition, that he ought to be considered as the solicitor of all the Plaintiffs in the causes, and further that he has a lien upon the funds in Court,—the purchase-monies of particular parts of the property, the subject of those suits,—for all the costs to the payment of which he may have become entitled in respect of the entire

(a) See 4 Y. & Coll. 218 et seq.

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trust. The costs claimed by Mr. *Poole* are for three classes of business, first, of the suits in equity, secondly, of the ejectments, and, thirdly, the general costs, by which I mean the bills of costs for business of the trust, not the subject of any cause. The order of which Mr. *Poole* complains,—proceeding upon the principle, that although he may have acted in matters by which the excepting parties were benefited, he did so, not 'upon the retainer of any of those parties, but upon that of *Robert* and *Richard Woolley*,—refuses him all lien upon the shares of the excepting parties in the trust estate, except as to the costs which it specifies. The order gives Mr. *Poole* his costs as between solicitor and client, in the three suits, including the costs of making out the title to the purchaser of the lot, the subject of each suit; and his costs of the ejectments; and of all such other proceedings as Mr. *Poole* can prove to have been done by the direct order of the excepting parties, or their solicitor: for all these costs, the order gives Mr. *Poole* a lien upon the fund in Court.

Mr. *Poole's* complaint is, that the order makes no provision for the third class of costs which I have described as general costs, and that thus the order deprives him of the benefit of that retainer which the report found in his favour, and also of a lien upon the funds in Court, in respect of that third class of costs.

Passing by, for the present, the form of the exceptions, [*575] *and the directions of the order in question respecting the costs of the petition, and confining my observations solely to the substance of the order,—if I abstain from expressing my approbation of the entire order, it is only because I doubt whether the learned Baron who pronounced the order may not, in some particulars, have gone further in Mr. *Poole's* favour, than according to strict law he was obliged to do. But, that he has not refused Mr. *Poole* any relief to which he was entitled, I am perfectly satisfied. The reasoning of the learned Baron as to the costs in equity proceeds on the ground, that a party in a cause cannot take the benefit, without bearing the reasonable expenses of it, but it in no way assumes the existence of any retainer as to those suits. The order gives to Mr. *Poole* the costs of the suits in equity,

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and of the ejectments, to the same extent in fact, as if he had been retained or adopted as the solicitor of the excepting parties, as well as of the other Plaintiffs; and therefore whether he was to any or to what extent their solicitor in those causes, is only material in so far as a more extensive retainer or adoption might be thence inferred.

There is a total absence of all evidence of original authority to Mr. *Poole*, by any of the excepting parties, to institute any of the suits in equity; and with respect to any subsequent adoption, the evidence appears also very satisfactorily to shew that Mr. *Poole* was never acknowledged as the solicitor of the excepting parties. Some of those parties (*Landers* and wife, and *Withy* expressly) objected to the suits; and, in fact, the very argument addressed to me, in support of the proposition, that Mr. *Poole* had become the solicitor of all the Plaintiffs by their adoption of the suits, was founded upon this, that the Plaintiffs, after notice of the suits, did not take any active steps to have their name as Plaintiffs struck out of the record. I cannot admit, that this ^{was} [*576] equivalent to a personal retainer of Mr. *Poole*, by those parties, even for the purpose of those suits. I would subject the Plaintiffs to the claim of the Defendants for costs, if the latter became entitled to costs; but it had no effect as between the excepting parties and Mr. *Poole*, until they came in and claimed the benefit of the suits; that benefit they would only take by submitting to pay the expenses of conducting those suits to a successful issue; and those costs having been given to Mr. *Poole*, I cannot believe that any court of justice would so extend the consequences of mere acquiescence by a party, in the use of his name in one suit, (and that under protest), as to hold that, not only did it give the solicitor the costs of that party in the suit, but that it also made the solicitor to become his solicitor, in other matters not connected with the suit. But this is the argument to which Mr. *Poole* is driven; for he has no evidence of the general retainer he insists upon, unless that general retainer is to be inferred from the alleged acquiescence in the suits, or from his employment in the ejectments.

I am by no means clear from reading the evidence, upon what

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the finding as to the ejectments proceeded. Whether the legal consequence of that finding, if correct, was to give Mr. *Poole* the lien upon the funds in Court, in respect of those costs which the order of the Court of Exchequer has given him, I need not inquire: the order in that respect is not complained of. This at least is clear,—that the retainer in the ejectments did not extend beyond that particular matter. And there is no evidence whatever, that the excepting parties gave Mr. *Poole* any original retainer, or afterwards adopted his services in the other matters of the trust, except so far as the acts done by Mr. *Poole*, upon the retainer of the

Woolleys, may have enured to the benefit of the other [*577] parties interested in the trust. And there is distinct evidence that Mr. and Mrs. *Landers* had their own solicitor acting for them, and watching their interest throughout.

The case therefore resolves itself into a question of law, namely, whether if a trustee, or one of several cestui que trusts, employs a solicitor to act in the matters of the trust, that retainer gives the solicitor a right of action against each of the other cestui que trusts, or a lien upon their shares of the trust estate, for his costs incurred in relation to the trust. That the above circumstances give no right of action against any but the retaining party is clear. That the same circumstances give no lien upon a trust fund, not administered in Court, is more than proved by the case of *Worrall v. Harford* (a), in which it was clearly laid down, by Lord *Eldon*, that a solicitor employed by a trustee has no lien upon the trust fund for his costs, although the trustee paying those costs might himself retain them out of the fund.

Then with respect to the trust funds in Court, belonging to the excepting parties, the cases of *Bozon v. Bolland* (b), *Lane v. Church* (c), and the other cases cited at the bar, are clear authorities, that in strictness the lien of a solicitor upon a fund, which his diligence recovers, is confined to the costs of recovering that very fund. In a suit to administer a trust estate the trustee may, if he pleases, claim all his costs, charges, and expenses as a trustee; but if he do not choose to extend his claim for costs (as such trustee)

(a) 5 Ves. 4.

(b) 4 Myl. & Cr. 354.

(c) 4 Madd. 391.

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beyond the costs of the suit, I know of no rule which could entitle his solicitor to insist upon his doing so, or to claim a lien upon the trust fund, in respect of his costs, not being costs of the suit. The contract of the solicitor *gives him a personal [*578] remedy against the party who retains him, and nothing more, except in the special case of the costs of a suit by which a fund is realised, and then his right is limited to the costs of that particular suit. *Worrall v. Harford*; *Bozon v. Bolland*.

[His Honor then adverted to the form of the exceptions, and the order which had been made thereon.]

From the observations I have made, it will be seen that having once satisfied myself that a retainer to Mr. *Poole* would not have given him a lien upon the funds in Court, for the general or third class of costs, I should (independently of the absence of retainer) have thought Mr. *Poole* wrong in his petition, even if the order allowing the exceptions were erroneous. I think the order upon Mr. *Poole's* petition ought to have been the same upon the merits whether the exceptions were allowed or not, and the course which I ought to take upon this appeal (unless the costs of the exceptions are an impediment to my doing so) would be the same as that which I pursued in the late case of *Robinson v. Milner (a)*,

(a) *ROBINSON v. MILNER.*

February, 25, 26, 28.

Where, on a reference as to title in a suit against the purchaser for specific performance, the Master reports in favour of the title, but the Court holds it to be so doubtful that the purchaser should not be compelled to take it, the bill may be dismissed without allowing the exceptions taken by the defendant to the report.

BILL by vendor, a trustee for sale under a settlement, against the purchaser, for specific performance of the contract. A reference for title was made. Objection was made to the sanity of mind of the settlor, who it appeared had been an inmate of a lunatic asylum a few weeks before the date of the settlement. The Master found in favour of the title. The purchaser excepted to the report.

Mr. *Sharpe*, for the exceptions, argued—first, that the incompetency of mind was proved; secondly, that the evidence made the title at least doubtful;—and in either case the Court would allow the exceptions; *Shapland v. Smith*, 1 Bro. C. C. 74; *Roake v. Kidd*, 5 Ves. 646; *Lowes v. Lusk*, 14 Ves. 547; *Wheat v. Hall*, 17 Ves. 80.

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[*579] that of disposing of the cause, without *deciding the question upon the exceptions. The exceptions insist that the Master should not have found some matters which he has found, and that he should have found other matters which he has not found. The order allowing the exceptions decides that they are right in every particular. Now, in this Court, an exception will not in general lie to a report, only because a Master may not have stated special circumstances, not in terms directed to be found, for the party may have the benefit of the same circumstances from the evidence. This led me to doubt whether, if the practice of the court of Exchequer were analogous to that in Chancery, the order allowing all the exceptions could be sustained. But as the merits of the case are not involved in this point of form,—as it is not asserted that the attention of the learned Baron was directed to the form, but only to the merits, and as I agree with him upon the merits, at least, so far as the order is complained of, I certainly should not be justified in varying his order, so as to give any costs upon the exceptions only. [1]

I have felt difficulty in understanding why Mr. *Pool*e should have been ordered to pay all the costs which he is directed to pay, of the petition, and of the costs in the office consequential upon the reference; but I do not think that I am at liberty to alter the order as to costs, where I think there was no substantial ground for the petition of rehearing.

Mr. *Bichner*, argued in support of the report, and cited *Vancouver v. Bliss*, 11 Ves. 465.

THE VICE-CHANCELLOR said it was clear the title was doubtful, and that being so, the purchaser would not be compelled to take it. But the Court, so deciding, was not therefore bound to allow the exceptions to the report of title. His Honor mentioned the case of *Cooper v. Denne*, 4 Bro. C. C. 80; *S. C.* 1 Ves. jun. 565; and said, he should express no opinion on the Master's finding, but should dismiss the bill with costs.

[1] See *Ballard v. White*, 3 Hare, 158.

1842.—*Liley v. Hey.***LILEY v. HEY.*

[*580]

1842: May 26, June, 4.

Devise to a corporation and other trustees upon trust to distribute the rents and profits annually, on a certain day, amongst certain families, according to their circumstances, as in the opinion of the trustees they might need such assistance, whose names were thereafter mentioned, viz. (naming twenty-four persons):—*Held*, first, not necessarily void for uncertainty; secondly, not void as tending to create a perpetuity; and, thirdly, a beneficial interest in persons who might lawfully take land by devise, and therefore not void within the statute of mortmain.

FRANCIS LILEY, by his will dated the 23rd of April, 1837, devised his real estate, in the county of York, to the vicar and churchwardens of *Kirkburton*, and their successors, and certain other trustees, their heirs and assigns, upon trust to receive the rents, and make thereout certain annual payments, and to “apply the remainder, if any, in manner and form following, that is to say, on every 1st of December, or Saint Thomas’s-day, to distribute amongst certain families, according to their circumstances, as, in the opinion of the said trustees, they may need such assistance, whose names are hereinafter mentioned: viz.—*William Copley*, *Kirkburton*, weaver; *Charles Lockwood*, ditto, ditto; *William Davy*, sen., ditto, spinner; *Betty Heywood*, ditto;” [and twenty other persons, named and described in like manner, making in the whole twenty-four persons.

Mr. *Rogers*, for the Plaintiff, insisted that the devise was, and was evidently intended to be, for charitable purposes, and therefore void: *Baker v. Sutton* ^(a); that it was uncertain, inasmuch as it was scarcely possible to execute a trust for the benefit of a large number of persons according to their need and circumstances, and still less, where the gift was not to the persons themselves, but to their families: *Morrice v. Bishop of Durham* ^(b); and that, even if the two former difficulties were removed, there would still remain the objection, that such a trust would tend to create a perpetuity—an objection which was fatal to the devise altogether, for it could not be severed and sustained as good in part only: *Leake v. Robinson* ^(c); *Ibbetson v. Ibbetson* ^(d).

(a) 1 Keen, 224. (b) 9 Ves. 399. (c) 2 Mer. 359. (d) 10 Sim. 515.

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[*581] *Mr. *Elmsley*, for the Defendants claiming under the residuary devise.

The parties to whom the beneficial interest in the residuary real estate is given, are persons who are competent to take the interest which is devised in trust for them. What rule of law interposes to prevent them? And if the devise be good, the Court will not allow it to fail for want of a proper trustee. Nor is there any uncertainty, for the Court has found no difficulty in putting a construction on the term "family:" *Wright v. Atkyns* (a); *Brown v. Higgs* (b). There is no necessary tendency to a perpetuity. The persons entitled under the gift, or at least many of them, are now living, and are in a position to take immediately the benefit of the gift; and such a mode may be adopted of carrying the trust into effect as shall not transgress any rule of law: *Banks v. Le Despencer* (c).

Mr. *Twells*, for the trustee.

VICE-CHANCELLOR :—

The testator, by his will, devised his real estate to trustees, upon trusts which, as the same are expressed in his will, completely exhaust the beneficial interest in those estates. The Plaintiff is the heir-at-law of the testator, and by the bill he insists that some of the trusts declared by the will are void, and that he, as the heir-at-law, is entitled to the beneficial interest in the real estate, so devised upon trusts which are void. The question before me is on the ultimate trusts declared by the will, of the rents and profits of the real estates, which are directed to be distributed annually by the trustees, among certain families, according to their circumstances or need. [His

Honor stated the words of the devise.]

[*582] *The heir-at-law, in this case, contends that this gift is void, upon three distinct grounds: first, as a devise for charitable purposes, within the statute; secondly, for uncertainty as to the objects intended to take; and thirdly, as tending to a perpetuity.

(a) 17 Ves. 261.

(b) 8 Ves. 572.

(c) 12 Sim. 520.

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In order to try the validity of the first of these objections, I shall assume that the other two cannot be sustained as objections to the devise; and, upon this assumption I am clearly of opinion, that the devise is nothing more than a beneficial devise to objects, who, whatever their situation in life may be, are objects to whom he might lawfully transfer an interest in his real estate by his will. With respect to the second objection, I have referred to Lord *Eldon's* observations in *Wright v. Atkyns* (a), shewing the great difficulty of giving a definite meaning to the word "family," except in those cases in which decision has affixed such a definite meaning to the word. In this case, I incline strongly to think that the testator has removed the difficulty by himself putting a construction upon the word. I incline strongly to think that, upon this will, the persons the testator has named in the will are the objects of his bounty, and that I should only be following the testator's direction, in putting this construction upon the will. But if that were not so, the cases of *Barnes v. Patch* (b), *Cruwys v. Coleman* (c), and *Grant v. Lynam* (d), are authorities that the Court can and will put a construction upon the word "family," where it may be reasonably done, rather than that a devise should be void. This view of the case disposes of the third objection, at least during the lives of the parties named in the will, who, under a construction to be put upon the word "family," might claim an interest under [583] the will, immediately upon the death of the testator. I admit that where a future interest in an estate is so given, that by possibility it may not take effect in possession until a period more remote than the law allows, that devise may be void from the beginning, as tending to a perpetuity. But where the will declares that objects are to take in succession, there is no reason why I should hold the will void, as to those objects to whom an interest not extending beyond their own lives is given immediately at the testator's death.

I cannot decide any thing with respect to the interests of the persons named in this trust, without knowing what the facts of the case are, with regard to them, and their children, and other descendants.

(a) T. & R. 156 et seq. (b) 3 Ves. 604. (c) 9 Ves. 319. (d) 4 Russ. 222.

1842.—In the Matter of 5 Vict. c. 5, &c.

The Defendants must make such inquiries as will elicit the facts necessary to enable me to apply the will to the circumstances of the case, if the circumstances should admit of such application.

[*584] IN THE MATTER OF THE ACT 5 VICT. c. 5 (a), AND IN
THE MATTER OF THE MARQUIS OF HERTFORD.

1842: June, 30th July 1st.

The order,—which under the act 5 Vict. c. 5, s. 4, may be issued upon motion or petition without bill filed, to restrain the Bank or any public company from permitting the transfer of stock or shares, or the payment of dividends,—cannot be continued after time has been afforded for filing a bill, and no bill has been filed.

A party who has obtained a *distringas*, under s. 5 of the act 5 Vict. c. 5, may, notwithstanding, in a proper case of merits and urgency, obtain a restraining order under s. 4.

Whether the party who has been injured by a felonious taking of his property, and is prosecuting the imputed felon, may not sustain a bill or proceeding in equity against the latter, to preserve in the mean time the property, the abstraction of which is the subject of the criminal charge—*Quære*.

On the 8th of April, 1842, the executors of the late Marquis of *Hertford* procured a writ of *distringas* (under the act 5 Vict. c. 5, s. 5) (b), to be issued out of this Court, and lodged at the Bank of England, to restrain the sale or transfer of 4000*l.* New 3½ per Cent. Annuities, standing in the name of *Nicholas Suisse*.

On the 28th of May, the Marquis of *Hertford*, the sole residuary legatee of the late Marquis, procured another writ of *distringas* to be issued, for restraining any sale or transfer of the same stock; but on leaving the same with the solicitors of the Bank, the solicitors of the Marquis were told, that the Bank would be advised to permit the transfer of the stock, notwithstanding the second *distringas*.

On the 2nd of June, a restraining order, under 4 (c) of the same

(a) An Act to make further provision for the Administration of Justice.

(b) For the form of the writ of *distringas* out of Chancery, see the first schedule to the above act; and for the practice thereon and the form of the affidavit upon which it issues, see the Order of the 17th of November, 1841. *Beavan*, Ord. Can. p. 186.

(c) This order is not issued but upon affidavit of the special grounds. *Ex parte Field*, 1 Y. & Coll. Chan. Ca. 1.

1842.—In the Matter of 5 Vict. c. 5, &c.

act (1 Vict. c. 5), was obtained upon motion, *ex parte*, on behalf of the Marquis, whereby the Bank was restrained from permitting the transfer of the said stock, standing in the name of *Suisse*, until the further order of the Court. This order was obtained upon affidavits to the following effect :—

*Mr. *Brabant*, the solicitor to the Marquis, deposed [*585] to the facts above stated ; and that *Suisse* was the valet, and in the confidence of the late Marquis, and was at various times intrusted by the latter with monies, his property, to a large amount, for the purpose of paying bills, and making other disbursements on his behalf ; that since the death of the late Marquis, the executors named in his will and codicils having discovered, or having reason to believe or suspect, that *Suisse* had applied to his own use monies belonging to the late Marquis, and intrusted by him to the said *Suisse* for particular purposes other than for the use of *Suisse*, and especially that *Suisse* had, with part of such monies, purchased in his own name divers sums of New 3½ per cent. Annuities, and had caused the same to be transferred into his own name, did, on the 4th of April last, cause *Suisse* to be taken into custody, on a charge of embezzling the monies of the late Marquis, and to be brought, before the magistrates at the police-office in Bow-street, who, upon hearing the evidence on the charge, committed him to prison ; that there was then and still the said sum of 4000*l.* New 3½ per cent. Annuities standing in the name of *Suisse*, a great part of which deponent believed, was purchased by *Suisse* with monies belonging to and without the direction, knowledge, consent, or privity of the late Marquis, and by *Suisse* embezzled or misappropriated ; that the executors, on obtaining the said first distringas, intended forthwith to file a bill to restrain the sale or transfer of the stock, but they had been advised, that, as the indictment of *Suisse* for embezzlement was at their prosecution, they could not with safety file such bill ; that the Marquis, who, as such residuary legatee, had an interest in the said stock, as forming part of the personal estate of the late Marquis, and also deponent, were apprehensive that *Suisse* would forthwith sell and transfer the said stock, whereby the same

1842.—In the Matter of 5 Vict. c. 85, &c.

[*586] would be wholly lost to, and irrecoverable by, the executors or the Marquis, unless the Bank were restrained from permitting the transfer.

Mr. *Brabant*, by a further affidavit, deposed that he was present at the examination of *Suisse* on the charge of embezzlement, and that it was upon such examination proved that the sum of 3700*l.* was, in February last, paid in Bank of England notes by Messrs. *Coutts & Co.*, bankers, to *Suisse*, upon the cheque of the late Marquis, and that *Suisse*, shortly after the receipt thereof paid part of the said identical bank-notes to the amount of 1100*l.* into the hands of Mr. *Graham*, a stock broker, who invested the same in the purchase of part of the said 4000*l.* stock ; and that on such evidence, and on the evidence also of the misappropriation of other Bank of England notes received by *Suisse* for the use of the late Marquis to the amount of 400*l.*, the magistrate had committed *Suisse* to take his trial on such charge : that he believed that other Bank of England notes to the amount of 300*l.* at least, which had been received by *Suisse* from Messrs. *Coutts & Co.*, in or since the month of November last, for the use of the late Marquis, had been also paid by *Suisse* to Mr. *Graham*, to be, and that the same had been, invested in a part of the said 4000*l.* stock.

On the 30th of June, 1842, a motion, pursuant to notice, was made on behalf of *Suisse*, that the order of the 2nd of June might be discharged with costs.

In support of this motion, *Suisse* by affidavit deposed, that the 4000*l.* stock had been purchased by him with his own monies ; and that no part of such monies belonged to the late Marquis, or was the product of his property ; that he was desirous of [*587] employing some part of the said *4000*l.* in his defence, which was to take place on the 6th of July : that legacies bequeathed to him by the late Marquis had not been paid ; and that the costs of his defence had already exceeded his means.

Mr. *Sharpe* and Mr. *De Gex*, in support of the motion, argued that the injunction could not be sustained, for several reasons : first, because there was no bill on the file relating to the matter in ques-

 1842.—In the Matter of 5 Vict. c. 5, &c.

tion, although ample time had been afforded for such a proceeding since the order had been obtained. There was no known mode of finally adjudicating upon the rights of suitors without a suit in the ordinary form. Analogy to the process by *distringas* shewed that a bill was necessary: *Scott v. Bank of England* (a). Secondly, the late Act offered the option of proceeding either under s. 5, by *distringas*, or under s. 4, by the restraining order; but it did not give the same party both forms of proceeding in respect of the same matter: in this case, however, the parties who represented the estate of the late Marquis, sought to avail themselves of both modes of proceeding, which was plainly oppressive: *Ex parte Jean Baptiste Amyot* (b). Thirdly, the facts shewn by the affidavits do not constitute a case upon which the Marquis could sustain a bill. If all these facts were proved in a suit, the bill must be dismissed, unless some case of collusion between the executors and *Suisse* were shewn, enabling the legatee to sue a mere debtor to the estate. It was, therefore, impossible to sustain an injunction upon a case so manifestly infirm: *Gedge v. Traill* (c). Fourthly, if the other objections were obviated, there is still this,—that the fund in question in this proceeding “is the subject of a prosecution for felony at the instance of the executors, and it is therefore not a matter in which equity will interfere or lend its assistance: *Cartwright v. Green* (a); *Cox v. Paxton* (b) *Gibson v. Woodfall* (c). Fifthly, if all the foregoing difficulties were removed, the relief must at all events be limited to that portion of the stock which the evidence professes to trace as the property of the late Marquis.

Sir Charles Wetherell and Mr. Schomberg, for the Marquis of Hertford, opposed the motion.

The present case is expressly within the 4th section of the late Act, which gives to “any party interested,”—“without bill filed,” the restraining order. It relieves the beneficial owner of the property to be protected from those technical difficulties under which he

(a) 2 Y. & J. 327.

(b) Phillips, 129, n.

(c) 1 Russ. & M. 281, n., and cases there referred to.

(a) 8 Ves. 408.

(b) 17 Ves. 320.

(c) 2 Car. & P. 41.

1842.—In the Matter of 5 Vict. c. 5, &c.

might otherwise be placed in sustaining a suit in equity. The extent of the remedy given by the 4th section is not to be construed by analogy to the remedy by distringas, for it is made much more efficacious. Instead of the process by distringas, which the Bank was at liberty either to notice or disregard, an injunction is given, by which the Bank and all other public bodies are bound, and the exigency of which continues, not at the discretion of the Bank, but until it is determined by this Court.

The cases referred to in which the existence of a felonious charge was an objection to the proceeding in this Court, were cases of suits for discovery, or suits in which the relief that was sought was the recovery in equity of property, the abstraction of which was the crime in course of prosecution: here the only relief sought is protection of the property, leaving it to be dealt with as [*589] the proper Court may direct, after the trial of the prisoner. If, however, the injunction cannot be sustained without bill, the Court will give a further time for filing a bill, and uphold the injunction in the interim.

VICE-CHANCELLOR :—

In certain special cases provided for by particular acts of Parliament, the Court of Chancery has power finally to adjudicate upon the rights of parties upon motion or petition in a summary way. But, except in those cases, the Court has no power of final adjudication upon any question of right but upon a bill filed. In this case no bill has been filed, and it is therefore certain that I cannot continue the restraining order, unless the late statute (a) empowers me finally to adjudicate upon the rights of parties in this case without bill, or unless the case is one in which I ought to suspend my judgment upon the motion, in order that the party who obtained the restraining order may have an opportunity of filing a bill.

Now, if, upon the first of these questions, it was my individual

(a) 5 Vict. c. 5.

 1842.—In the Matter of 5 Vict. c. 5, &c.

opinion, that the statute was intended to confer a new and summary jurisdiction upon this Court finally to adjudicate upon disputed rights without a bill, I should have great difficulty in acting upon that opinion, having regard to the decision of the *Lord Chancellor*, in *Ex parte Amyot*, and to what I know to be the opinion of other branches of this Court upon the same point. But my individual opinion is, and always has been, that the 4th section of the Act does not, upon any reasonable construction of which it is capable, confer any such new or summary jurisdiction. That clause was intended only for interim purposes,—to pro- [*590] tect stock until the party claiming it should have an opportunity of asserting his rights by bill in the ordinary way,—an opportunity often wanting, from the facility with which that species of property is transferred from hand to hand; and which the common distringas, preserved by the 5th section, does not in all cases afford. A distringas remains only at the discretion of the Bank. The restraining order, which the 4th section enables the Court to grant, is imperative; it continues so long as the Court sees fit to direct, and can only be discharged in the mean time, upon the application of parties interested.

I do not think that the decision of the *Lord Chancellor* in *Amyot's* case had the effect attributed to it in the argument, of establishing it as an abstract rule, that the same party, who has obtained a distringas under the 5th section, cannot be entitled to a restraining order under the 4th section (a); the case of *Ex parte Amyot* did not call for the decision of that point. If it had been so decided, that would have been conclusive on this motion, for it is impossible upon this evidence to treat the executors and the Marquis as different persons. I cannot but think, however, that cases might arise, in which from the discovery of new matter after a distringas had issued, or from the Bank peremptorily, but erroneously, refusing to notice a distringas, or perhaps from other causes, the party who obtained that writ might notwithstanding, upon a full disclosure of the facts, in a case of merits and urgency, entitle himself to a

(a) See *In re Marquis of Hertford*, Phillips, 129.

1842.—In the Matter of 5 Vict. c. 5, &c.

restraining order under the 4th section. I am therefore better satisfied to decide this case upon other grounds.

I am clear, that I cannot continue this restraining [*591] order without a bill being filed ; and, no bill being upon the file, the only question is, whether I should continue the restraining order until that is done :—the right of the Court to do which, in a proper case, I do not mean to repudiate. The Court has power to discharge or vary the order, according to the justice of the case, under the very words of the Act. But is this a case for granting that indulgence ? The restraining order was granted on the 2nd of June, after a *distringas* removed, and on the 30th of June no bill is filed, nor is any reason suggested for the omission, except the argument upon which I have already expressed an opinion,—that the Court can entertain the whole case without a bill. If the bill had been filed, *Suisse* would now be in a position to liberate this property from restraint, if upon the merits of the case he could entitle himself so to do. If I were now to continue the restraining order, I should thereby be imposing, for the third time, a restraint upon him, at the suit of the same party. This I think ought not to be done, where the necessity for further delay in disposing of the case arises wholly from the omission of the party who claims adversely to him.

Being of opinion that the present state of the proceeding, as it now stands, would not justify me in continuing the restraining order, and being also of opinion that I ought not to grant time for altering the present state of the proceedings, it is not strictly necessary that I should consider what the probable result of the case would have been if a bill had been filed. Upon this point I will add only, that if I were to treat Mr. *Brabant's* affidavits as a bill filed, I do not see how I could, upon those affidavits only, give Lord ³*Hertford* any relief, to which the executors would not have been entitled, if [*592] the application had been made by them ; and certainly the late case before the *Lord Chancellor* shews that great difficulties would have stood in the way of the executors, if, without any other explanation than these affidavits furnish, they had sought to maintain this order.

 1842.—*Welch v. Welch.*

Upon the cases of *Cox v. Paxton (a)*, and *Gibson v. Woodfall (b)*, as authorities for the broad proposition, that a court of equity can in no case afford interim protection to the property of a man, who, having been deprived of his property by a felony, is doing his duty to the public by prosecuting an offender, I am not called upon to give any opinion.

It is satisfactory for me to recollect that the difficulties which Lord *Hertford* is under in the present case, were brought to the attention of his advisers at the time the restraining order was made; and I am satisfied that those difficulties have been removed, only because the circumstances of the case are not such as admit of their removal. The restraining order must be discharged with costs.

 *WELCH v. WELCH.

[* 593]

1842: July 6.

The motion for leave to enter a memorandum of service of a copy of the bill, under the 24th Order of August, 1841, needs not to be supported by an affidavit shewing that the Defendant is not an infant.

MR. G. L. RUSSELL moved, under the Order XXIV, of August, 1841, to enter a memorandum of service of the copy of the bill upon the Defendant. The affidavit did not state, that the Defendant on whom the service was made was not an infant. He referred to *Haigh v. Dixon (c)* as an authority that the order might be made without an affidavit shewing that fact.

THE VICE-CHANCELLOR, upon that authority, made the order.

(a) 17 Ves. 329.

(b) 2 Car. & P. 41. See *Perkins v. Bradley*, ante, p. 329.

(c) The case referred to, ante, p. 317, n. (a), in which it was decided by the Lord Chancellor, that it was not necessary by affidavit to shew that the defendant is not an infant.

 1842.—*Portlock v. Gardner.*

UPON the evidence which the Court requires in support of the motion under the 24th Order of August 1841, to enter the memorandum of service of the copy of the bill, see *Blew v. Martin*, ante, p. 150; *Gibson v. Haines*, ante, p. 317. [1]

The facts of which the Court requires to be informed by affidavit may be summarily stated as the following—that the copy of the bill (office copy or examined copy, as the case may be), omitting the interrogating part, was actually served;—when—where—and how it was served, (personally or otherwise); and that the bill does not, as against the Defendant, pray a subpoena to appear and answer, or any account, payment, conveyance, or other direct relief, (see form of the Order, ante, p. 151); but does pray that, upon his being served with a copy thereof, he may be bound by all the proceedings in the cause. It may be presumed that a statement on the affidavit to the above effect—that the *prayer* of the bill brings it within the 23rd Order, will enable the Court to dispense with any statement at the bar of the nature of the suit.

[*594]

*PORTLOCK v. GARDNER.

1842: June 22, 24, 25, 29.

The transfer by an executor of the trade of his testator, and of the premises in which it was carried on, (which were of small value) to a third party, who afterwards continued the trade for his own benefit:—*Held*, under the circumstances, not to be necessarily a breach of trust.

Where upwards of twenty years had elapsed after an executor had settled the accounts of his testator's estate with the residuary legatee, and had given up all interference in the trust, it was held, that the onus was on the residuary legatee to prove that the conduct of the executor, which might have been a breach of trust, was so in fact; and that the onus was not shifted by an admission that the account was settled on a misunderstanding of the rights of the parties, by which the residuary legatee was prejudiced.

A court of equity will not after a great lapse of time (as of more than twenty years) and where no actual fraud is proved, enter into inquiries for the purpose of raising an implied trust against a defendant, although the same lapse of time would be no bar to a claim founded upon an express trust.

It being admitted by the Defendants that an account had been settled between the residuary legatee, the executor, and another Defendant, upon an erroneous footing, by which the other Defendant was benefited, and the residuary legatee was prejudiced, the Court, on dismissing the bill of the residuary legatee, did so without costs,

THE testator, *T. Portlock*, by his will, in 1810, directed his house-

[1] In *Penfold v. Bouch & Hare*, 157, the Vice-Chancellor said that it ought in all cases to appear by affidavit in which way the truth of the copy served has been ascertained.

1842.—*Portlock v. Gardner.*

hold goods to be sold, and his debts paid, and after giving several legacies, proceeded thus: "If there should be any deficiency of cash to pay the legacies, each legatee shall take a proportionate share. And in case of any overplus, I give it to *Thomas Portlock*, who resides in my house, to enable him to carry on and for the use of my trade,"—"and furthermore, I give and bequeath unto my worthy friend *Thomas Davis*, schoolmaster, in trust, all my stock in trade, tools, and implements thereto belonging, for the under-mentioned purposes,—that he give the trade to my nephew *Thomas Portlock* and *Joseph Turton*, the profits of which shall be divided between them, share and share alike, so long as the said *Joseph Turton* shall think proper to work and continue as co-partner with the said *Thomas Portlock*, and no longer. And I give the said *Thomas Portlock* all my stock in trade, and implements thereto belonging, to enable them to carry on the said trade, which shall be valued; and if the said *Joseph Turton* wishes to take half of the said stock and tools, he must pay to the said *Thomas Portlock* in money, or allow it out of his share of profits, according to the valuation; and I leave this to his discretion. The said *Thomas Portlock's* legacy, nevertheless, is and shall be upon condition that he behave himself in a steady, orderly, and upright manner, and always abide by the direction of my friend *T. Davis*; and if he does not then it is my desire that the said *T. Davis* do divide all his said legacy, and all and every interest in this my last will and testament among my relations," [naming them]. "The said trade to be carried on under the firm of *Thomas Portlock* and *Joseph Turton*; and the said trade, for their joint interest, shall be conducted and managed by the said *Thomas Davis*, who shall collect all debts, due to me at the time of my decease, to enable them to pay the said legacies." The testator appointed *Davis* and the defendant *W. Gardner* executors of his will, and added therein the following direction:—"The said *Thomas Davis* shall, immediately after my decease, take possession of my house and premises, which are held on lease, and also my garden, for the purpose of carrying on the said trade for the said *Thomas Portlock* and *Joseph Turton*, but the garden may be sold, if necessary."

1842.—*Portlock v. Gardner.*

The testator died in April, 1810, the said *Thomas Portlock*, the Plaintiff, being then an infant. *Davis* renounced probate of the will, which was proved by *Gardner* alone. The testator carried on the business of a gun-barrel maker up to the time of his death, at which time some contracts which he entered into with the Board of Ordinance were uncompleted. *Gardner* did not act personally in the trusts of the will, but executed a power of attorney, whereby he appointed *Turton* to get in and manage the estate and the trade, and discharge the debts and legacies. Under this power, [*596] *Turton* entered into possession of the premises, stock in trade, and effects of the testator, and paid or discharged the debts and legacies. He also completed the contracts which were left unfinished at the testator's death, and carried the monies received in respect thereof to the account of the estate. *Turton* thenceforward continued the trade on his own account, and except the proceeds of the said unfinished contracts, it did not appear that the testator's estate received credit for any profits made after the testator's death.

Turton afterwards, in partnership with another person, entered into some further contracts with the Board of Ordinance.

The Plaintiff from the time of the death of the testator lived with *Turton* as an apprentice or workman, on the same premises, until after he was twenty-one years of age : he also acted as book-keeper for *Turton*, who was an illiterate man. The Plaintiff attained his age of twenty-one years in 1816. An account was afterwards made out partly in the handwriting of *Gardner*, and partly in that of the Plaintiff, purporting to be a particular of the debts and credits of the testator, exhibiting a balance or surplus of 327*l.* 14*s.* 8*d.*, which was described as "the balance to be divided between Mr. *Turton* and *Thomas Portlock*,—*Thomas Portlock's* share 163*l.* 17*s.* 4*d.*" Of this sum it appeared £18 was then paid, leaving 145*l.* 17*s.* 4*d.* due to the Plaintiff. At the foot of this account the following memorandum was made and signed in April, 1817 :—"Agreed between *J. Turton* and *T. Portlock*, that 100*l.* part of the above sum shall be left at interest in Mr. *Turton's* hands, at 5*l.* per cent. from Christmas last, and that the remaining sum of 45*l.* 17*s.* 4*d.* shall forth-

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with be paid to *T. Portlock* by said *J. Turton*.—Signed, *J. Turton*, *T. Portlock*.—Witness, *W. Gardner*."

*No sale was made of the leasehold premises in which [*597] the business was carried on, nor did it appear that the interest of the testator in those premises was of any value: they were held at a rack-rent, and were occupied by *Turton* up to the time of his death.

The Plaintiff continued to work for *Turton*, as a journeyman at weekly wages, until the year 1837.

Turton died in November, 1838, having by his will bequeathed a legacy of 200*l.*, and his shop tools and gun barrels, to the Plaintiff.

The bill was filed in March, 1840, against *Gardner* and the executors of *Turton*, stating the foregoing facts, and that no information was given to the Plaintiff of his rights under the will, but that *Turton* and *Gardner* had fraudulently kept him in ignorance thereof: that *Turton* and *Gardner* had not accounted for or paid to the Plaintiff the value of the said trade, stock in trade, tools and implements, or residuary personal estate, but that *Turton* with the consent of *Gardner* had applied the same to his own use: that *Turton* had died possessed of considerable personal estate, which he had acquired by means of the said trade; and that the Plaintiff had first become aware of his rights under the will of the testator in the year 1839, after the death of *Turton*. The bill prayed that an account might be taken of the personal estate of the testator, got in and received by *Gardner* and *Turton*, and of the application thereof, and that the Defendants *Gardner* and the executors of *Turton* might be declared answerable for the same: that the Plaintiff might be declared to be entitled to the residuary estate of the testator, and to a moiety of the clear proceeds and profits which had accrued from the trade, or business of the testator, [*598] since his death, and to the interest of the capital of the testator invested therein; and that the Defendant *Gardner*, and the other Defendants as executors, were liable and accountable for the same.

The Defendant *Gardner*, by his answer, alleged that the will was read over to the Plaintiff, (he being then fifteen years old), and also

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to other persons, after the funeral of the testator : that the Plaintiff had full knowledge of his rights under the will, at the time he settled and signed the account, in April 1817 : that the account was settled on the footing and under the belief that the parties were entitled in equal moieties : that the remaining 145*l.* 17*s.* 4*d.*, had been long since paid and accepted by the Plaintiff in satisfaction of his claims under the will ; and that he (the Defendant) had performed the trusts of the will in the manner which appeared to him and was in fact the most for the benefit of the testator's estate. The Defendants, the representatives of *Turton*, said they believed that the Plaintiff was aware of his rights, and that the settlement had taken place on the footing of such rights, as they were understood by the parties. All the Defendants insisted that the time which had elapsed was a bar to the claim of the Plaintiff.

At the hearing, all the relief prayed, except as to the moiety of the profits of the trade after the death of the testator, was waived.

Mr. *Sharpe*, and Mr. *Beavan*, for the Plaintiff.

The trade of the testator has been continued on the same [*599] premises, with the stock and good-will, which "belonged to the testator's estate ; and it has been so carried on by parties knowing the rights of the Plaintiff, and who acquired the possession of the property and business by means of the trust reposed in them. These circumstances clearly entitle the Plaintiff to an account of the profits : *Wedderburn v. Wedderburn* (a). *Turton* is in this respect in the same position as *Gardner* would have been, for the latter delegated the performance of the trust to the former ; and he, being fully aware of the terms of the trust, undertook to perform it : *Wilson v. Moore* (b), *Myler v. Fitzpatrick* (c). In cases of trust, time is not regarded ; but if it were, there was a fraudulent concealment of the facts from the Plaintiff, which is shewn by the erroneous account which he was induced to settle, as well as

(a) 2 Keen, 722 ; S. C. 4 Myl. & Cr. 41.
(c) 6 Madd. 360.

(b) 1 Myl. & K. 127, 337.

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by the fact that the Defendants have not shewn that they ever gave the Plaintiff any notice of what his rights under the will really were. The Court will make parties so conducting themselves answerable at any distance of time. *The Master of the Rolls* (a), in *Trevelyan v. Charter* (b), said—"It is fitting that those who thus appropriate the property of others should be assured that in this Court no time will secure to them the fruits of their dishonesty, but that their children's children will be compelled to restore the property of which their ancestors have fraudulently possessed themselves. Time is no bar, except the party, having full information of his injuries and rights, allows time to elapse without seeking relief." It is a well-established principle, that a trustee cannot "carry on [*600] a business with the trust property belonging to an infant, for his own benefit, unless he has come to this Court and relieved himself of his character of trustee under its sanction (c).

Mr. Spence and Mr. Stuart Monteath, for the Defendant Gardner.

Gardner might have been responsible for the trust estate until the legacies were discharged, and the residuary estate transferred or delivered up to the residuary legatee or with his privity. The duty of the executor to this extent was performed by *Gardner*. With the arrangements between *Turton* and the Plaintiff, *Gardner* had no concern: the residue of the testator's estate was carried into the business, and *Turton* took it with the assent of the Plaintiff, and, so far as *Gardner* knew, for their joint benefit. The presumption at this distance of time will be in favor of the executor; and there is no evidence of any departure from his duty, which can rebut the presumption: *Pickering v. Lord Stamford* (d), *Herey v. Din-*

(a) Sir C. C. Pepys.

(b) *Trevelyan v. Charter*, June 2nd, 1835. A purchase at an under value by a steward and agent to sell, set aside forty-seven years afterwards. The case has been argued before the House of Lords on appeal; and now stands for judgment.

(c) Vide p 263, supra.

(d) 2 Ves. jun. 272, 581.

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woody (a), *Jones v. Tuberville* (b), *Beckford v. Wade* (c), *Chalmer v. Bradley* (d), *Campbell v. Graham* (e), *Story on Equity*, vol. 1, p. 502.

Gardner has not interfered with the estate since the account was made out and signed in 1817, and therefore he cannot be affected by the conduct of *Turton* subsequently, even if that conduct created a liability in the latter. *Gardner* therefore is entitled to the protection of the Statute of Dimitations (f), which is a bar [*601] to the claim of a legacy after twenty years: **Sheppard v. Duke* (g), *Prior v. Horniblow* (h), *Phillipo v. Munnings* (i).

Mr. *James Russell*, and Mr. *Wright*, for the representatives of *Turton*.

There was no trust reposed by the testator in *Turton*; he was at the most, only the agent of *Gardner*, and accountable to him alone. Equity will not raise an implied trust after the time which has elapsed; still less will it presume misconduct in the executor for the purpose of raising that implied trust in a third party. The circumstances, therefore, do not here occur to which the cases cited apply.

Mr. *Sharpe* in reply.

In this case there is no adverse possession. The possession of a trustee is not adverse to his cestui que trust; unless an implied trustee, repudiating that character, should insist upon his own beneficial title, and set the cestui que trust at defiance—the latter being fully aware of the circumstances. If adverse possession, in the sense in which it existed in this case, were allowed to create a bar, the profits of a trade could never be recovered in such cases as *Welderburn v. Welderburn*, or *Willett v. Blanford* (k): in those

(a) *Id.* 87.

(c) 17 *Ves.* 87.

(e) 1 *R. & Myl.* 453.

(g) 9 *Sim.* 56

(i) 2 *Myl. & Cr.* 309.

(b) *Id.* 14.

(d) 1 *J. & W.* 59.

(f) 3 & 4 *Will.* 4, c. 27.

(h) 2 *Y. & Coll.* 200.

(k) *Ante*, p. 252.

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cases, like the present, the complaint is, that the party has carried on business on his own account with the Plaintiff's property. The fact that he has dealt adversely, i. e. for his own ostensible benefit, and not for that of the Plaintiff, is the foundation of the equitable claim. The material facts are, that *Turton*, by the instrumentality of *Gardner*, possessed himself of the whole residuary estate, accounting only for a moiety,—that he alone "took [*602] the premises, and the fruits of the subsequent trade in those premises, including the power of entering into all the subsequent beneficial contracts with that trade,—and that he excluded the Plaintiff from any share of the benefit which resulted from the possession which was thus acquired.

The cases which were cited in the late cause of *Boddy v. Lefever* (a) shew, that all persons entering on the estate of an infant will be treated, not as thereby acquiring an adverse title, but as guardian or bailiff for the infant.

VICE-CHANCELLOR :—

I reserved my judgment in this case,—less because I had any doubt of the course which the justice of the case requires, than from the apprehension that I might in any degree infringe upon that doctrine, which is well established in this Court, and which I had lately to consider and apply in the case of *Willett v. Blanford* (b). In order to guard myself from being thought to disregard that doctrine, I shall endeavour to make the grounds of my judgment clearly understood.

(a) *Boddy v. Lefevre*, Jan. 31st, 1842. The bill was filed to charge the defendant with the rents and profits, or with an occupation rent, of a leasehold messuage, which he had continued to occupy after the title of the plaintiffs, who were infants, accrued. *Mr. Temple*, and *Mr. Randall*, for the plaintiffs, cited *Lit. Ten. L. 2, c. 5, s. 124*; *Co. Lit. 89. b.*; *Yallop v. Holworthy*, 1 *Eq. C. Ab. 7*; *Roberdeau v. Rous*, 1 *Atk. 544*; *Morgan v. Morgan*, *Id.* 488; *Dormer v. Fortescue*, 3 *Atk. 130*; *Newbery v. Bickersstaffe*, 1 *Vern. 296*; *Cary v. Bertie*, 2 *Vern. 333*; *Curtis v. Curtis*, 2 *Bro. C. C. 631*; *Pulteney v. Warren*, 6 *Ves. 88*; 2 *Fonblanque*, *Tr. Eq. 235*; 2 *Story on Equity*, 638; *Doe v. Keen*, 7 *T. R. 386*. The cause ended in a compromise.

(b) *Ante*, p. 353.

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[*603] I shall first suppose *Gardner* to be the sole *Defendant, and the acts of *Turton* to be referred to, only as grounds for charging *Gardner*. This might be the case, because *Turton* was merely the agent for *Gardner*, and the Plaintiff had no original privity with *Turton*, though he may subsequently, by his own acts, have adopted the liability of *Turton*, either jointly with, or in exoneration of *Gardner*. In this view of the case, the first point with which I was pressed was the doctrine of this court, established in *Crawshay v. Collins*, and the other cases of that class, down to *Welderburn v. Welderburn*, which I endeavoured to follow in *Willett v. Blanford*:—that where a trustee uses trust property for his own purposes, and thereby makes a profit, he shall account for such profit to his cestui que trust. And if in this case *Gardner* had made any profit, I might have been bound to follow out the principle of those cases as against him; but here no profit or advantage is made by *Gardner*. The charge against him is one of misfeasance only, in allowing *Turton*, a stranger, to possess the assets. Perhaps there might originally have been a case for charging *Gardner* with five per cent. interest on the amount he might have received on the ground of negligence. But, as against him, the cases have no bearing, which establish merely that, where a person in a fiduciary character makes a profit of the trust property, he shall account for the profits he has made.

It is further to be observed, that *Gardner*, though executor under the will, and in that sense a trustee, was not the trustee appointed by the will to manage and carry on the trade. *Davis*, not *Gardner*, was the trustee for that purpose. The renunciation of *Davis* did not throw upon *Gardner* the obligation of personally managing the trade, however it may have thrown upon him the difficult task of deciding, what, in the case of this small estate, he should

[*604] do towards insuring the *performance of the testator's intention; and if he honestly thought that the transfer of the leasehold premises to *Turton* was, in the circumstances, the best course he could take for the benefit of the estate, I could not deal with him in any other way, than as an executor chargeable for the amount or value of the assets of the testator, with interest from his death, at a rate depending upon the circumstances of the case.

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Looking at the suit in this point of view, as seeking all the relief to which, against *Gardner* alone, the Plaintiff could be entitled under the circumstances of the case, the first material objection which presents itself is that which has been founded on the Statute of Limitations (a). The construction which has been put upon that statute is, that, after twenty years, it constitutes a bar to the demand of a legacy, although not charged on real estate: *Sheppard v. Duke* (b); and it has been also held to be applicable to a residuary gift: *Prior v. Hornblow* (c). Without deciding upon the operation of the statute in this case; and even supposing that it has no application, still it is impossible to disregard the time which has elapsed. The Plaintiff came of age in 1816, and I cannot avoid imputing to him at that time or soon afterwards a knowledge of the will. He had worked on the premises from a period anterior to the death of the testator. A few months after the Plaintiff came of age, he applied to *Gardner* for an account of the estate, and was referred to *Turton*, as the person who had possessed all the assets of the testator; and with the privity of *Gardner*, he accepted *Turton* as his debtor, and settled an account with him in which the legacies are stated as matters of discharge. The Plaintiff afterwards continued in the employ of *Turton*, on [*605] the same premises, receiving wages from him: there is no suggestion that *Gardner* has ever received any profit from the business. The bill is not filed until twenty-four years after the adoption of *Turton* as the accounting party. It is impossible that I can, after that time, consider the onus still to lie upon *Gardner* to justify his acts in the administration of the estate; but, on the contrary, I must consider that it lies upon the Plaintiff to shew in what respect the conduct of *Gardner* was not justifiable.

In considering the conduct of the parties, it is not unimportant to observe, that there is no gift of the leasehold house or garden, except in the direction that the trade shall be carried on there; and that there is no gift of the residue, unless a residuary gift can be implied. The leasehold premises, in fact, do not appear to have

(a) 3 & 4 Will. 4, c. 27, s. 40.

(b) 9 Sim. 567.

(c) 2 Y. & Coll. 200.

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been of any value in the sense of being made assets: they are alleged to have been held at a rent equal to their annual value; they were probably necessary for the trade; and why am I to conclude that *Gardner* was not justified in abandoning these premises to *Turton* for the purposes of the trade? The then existing contracts were completed for the benefit of the estate. The new contracts with the Board of Ordnance do not appear to have been made with any reference to the credit or good-will acquired by the trade of the testator. The success of the business after the death of the testator must, it cannot be doubted, have depended, at least for several years, wholly on the exertions of *Turton*,—a material consideration in determining the conduct of *Gardner*, as it would be in the view of this Court (a). The capital directly employed in the trade [*606] appears to have consisted of little more than the tools used in it. In such circumstances, it cannot of necessity be inferred that *Gardner* committed any breach of trust. It would be a most unreasonable and oppressive rule to lay down, that no conclusive settlement of the rights of parties in a small trade or handicraft of this nature can be made, where infants are concerned, without coming to a court of equity, the expenses of which would swallow up the estate, if the estate were even sufficient to bear them.

I now come to the consideration of the case with reference to the claim against the estate of *Turton*. *Turton* was originally nothing more than an agent of the executor, in administering the estate. At the same time, it may be observed, that if the conduct of *Gardner* amounted to a breach of trust, and *Turton*, being aware of that breach of trust, became a party to it, the Court would probably have dealt with him as with an actual trustee, to the extent of his participation; on the other hand, if there were no actual or concerted breach of trust, *Turton* would, at the most, be regarded as only a constructive trustee. I have said that, as against *Gardner*, I think a breach of trust is not the necessary result of the evidence. And after the settlement of 1817 between the Plaintiff and *Turton*, in whose possession and ownership of the trade the Plaintiff for more than twenty years afterwards acquiesced, I cannot regard *Turton*,

(a) Vide *antc*, pp. 270, 271.

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who was himself neither a direct trustee, nor the representative of any direct trustee, as being, at the farthest, more than constructively affected with the trust. If *Gardner* had been the party by whom, or for whose benefit, the trade was carried on, he, or those who represented him, might have found it difficult to resist the suit, without more evidence of the propriety of the transaction than has in this case been given. The same decision might have followed as in *Wedderburn v. Wedderburn*. The effect of [*607] the circumstances with respect to *Turton*, who cannot be treated as more than a constructive trustee, is materially different. There is a time beyond which the Court will not enter into an enquiry upon a case of controverted facts for the purpose of raising and giving effect to a trust by mere implication (a); and to the benefit of the protection which time affords I think the Defendants in this case are entitled.

I cannot, for the reasons which I have stated, charge either *Gardner*, or the estate of *Turton*, with the profits of the trade which are sought to be recovered in this suit; and no other relief is now asked. The bill must therefore be dismissed. The Plaintiff having failed to establish the claim which he has asserted by his suit, the general rule would apply, that he must pay the costs of a fruitless litigation. But the Court may consider how far the party had a ground for bringing forward his claim. In this case, the settlement of 1817 is not intelligible by reference to the interests of the parties; and although at this distance of time I might, in support of the transaction, have inferred that it was the result of some arrangement between the parties, which they were competent to make; yet the answers exclude that supposition, by alleging, that the division took place upon the footing of their actual rights under the will. Taking this to be the case, it is plain that the Plaintiff was to some extent injured in the mode of division which was adopted; and I think, under such circumstances, no costs should be given.

(a) *Beckford v. Wade*, 17 Ves. 27.

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[608]

TAYLOR v. PUGH. .

1842: July, 20, 22, 23, 26.

The equity of the husband to set aside a settlement of the property of his wife executed by her during the treaty of marriage, without his knowledge, is precluded by his conduct towards her, whereby she is deprived of the power of retiring from the marriage, or, therefore, of stipulating for a settlement. To what extent the same equity is taken away, by the absence of any other settlement in favour of the wife,—or the poverty of the husband,—or the reasonable nature or meritorious object of the impeached settlement,—or the ignorance of the husband of the existence of the settled property—*Quære*. It is not necessary, in order to establish his title to this equity, that the husband should prove actual fraud or deception (for deception will be inferred), if, after the commencement of the treaty of marriage, the wife should have attempted to dispose of her property, without the knowledge or concurrence of her intended husband.

THE bill prayed that a settlement of the 20th of December, 1837, which had been executed by the Defendant *Elizabeth Taylor* a short time before her marriage with the Plaintiff, might be declared to be fraudulent and void, and delivered up to be cancelled; and the share of the Defendant in her father's estate, the subject of the settlement, be paid to the Plaintiff, her husband.

Elizabeth Taylor's father died intestate in October, 1837, leaving seven children; and their distributive shares of his estate, as his next of kin, amounted to 800*l.* apiece. *Elizabeth* resided with her brother, the Defendant *William*, until early in December, in the same year; when, for some reason (alleged, but not proved to be the harsh treatment she received from her brother), she left his house, and took up her abode with the Plaintiff. The bill alleged, and some evidence was given to shew, that after this, at the request of *William*, her brother, communicated through a relation, that she would go to Mr. *Dansey's* (a solicitor at Ludlow) "to sign to her property as the rest of her brothers and sisters had done," the Defendant *Elizabeth* went to the office of Mr. *Dansey* and executed the settlement, without knowing its effect. It appeared, however, by the evidence, that she was twice at the office, and that on the first occasion she instructed Mr. *Dansey* to settle her property

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so that she should have it for her life ; and that Mr. *Dowsey* prepared the settlement, which "was executed by her [*609] at his office, after the same had been read, and the contents and purport explained to her.

By the settlement, the Defendant, then *Elizabeth Pugh*, assigned the 300*l.*, and all other her share of her father's property, to the Defendant *William Pugh* and another, upon trust to invest the same, and pay the interest and dividends to the separate use of herself for life, with remainder to her children in equal shares, and if she should have no children, then as she should appoint, and in default of appointment to her next of kin, excluding any husband she might leave ; with power to the trustees, on their own authority and discretion, to call in all or any part of the trust fund, and to apply or advance the same for the benefit of the defendant *Elizabeth* and any children she might have, or any one or more of them, exclusive of the other or others, as the trustees might think fit : it being provided that the exercise of such power was to be wholly at the option of the trustees. The 300*l.* was duly invested upon the trusts of the settlement.

On the 31st of December, in pursuance of a contract of marriage which the Plaintiff alleged was made some months before, the banns were published ; and on the 17th of January, 1838, the Plaintiff and the Defendant *Elizabeth* were married.

The bill, which was filed against the trustees and the next of kin, alleged that the Plaintiff discovered the settlement for the first time after the marriage,—that it was a fraud upon his marital right,—and that it was also a fraud upon the Defendant his wife, as having been executed by her under misrepresentation of the purport of the instrument, she being unable either to "read [*610] or write. The answer of the wife concurred with the statement of the bill. The answer of the trustees denied all fraud, and alleged that the wife was informed of the nature and effect of the deed which she executed. The evidence supported the latter statement.

The only evidence which was tendered of the time when the treaty of marriage began, consisted of declarations of the wife, made

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whilst she was living with the Plaintiff before her marriage. The admission of these declarations was opposed, but the cause being decided upon a point independent of the time of the marriage contract, no decision was pronounced as to the admissibility of this evidence.

Mr. *Bird*, for the Plaintiff, argued, that the title of the Plaintiff to relief, on the ground of the fraud on his marital right, was clear upon a train of authorities: *Carleton v. Earl of Dorset* (a); *Goddard v. Snow* (b); *St. George v. Wake* (c); *England v. Downes* (d). The ostensible purpose for which the Defendant *Elizabeth* was invited to attend the solicitor's office, that of "signing to her property," was at least ambiguous, and not calculated to give her any previous information of the intended settlement. But the settlement was on the face of it improper, and such as no person could be reasonably advised to execute; for the power of disposing of the principal fund amongst children is given to the trustees independent of the parents, and even during the life of the Defendant herself. On this ground alone, it would be impossible to support the deed, in the total absence of any instructions for so unusual a clause.

[*611] *Mr. *Metcalf*, for the Defendant *Elizabeth*, submitted to the relief prayed.

Mr. *C. P. Cooper* and Mr. *Briggs*, for the trustees and the other parties.

There is no evidence of any fraud upon the husband. It does not appear that any representation was ever made to him, or even that any facts came to his knowledge, from which he was led to believe that he would become entitled to any property by reason of the mar-

(a) 2 Vern. 17.

(b) 1 Russ. 485.

(c) 1 Myl. & K. 610.

(d) 2 Beav. 522.

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riage: he does not, therefore, shew a case upon which the Court will interfere: *Countess of Strathmore v. Bowes* (a); *De Manneville v. Crompton* (b). There is no evidence that there was any treaty of marriage subsisting at the time the settlement was made, which is also necessary as a foundation for this equity: *Goddard v. Snow* (c). The settlement will be supported by the Court, on the ground of its reasonable or meritorious character under the circumstances, and particularly after the then imprudent conduct of *Elizabeth Pugh*: *Hunt v. Matthews* (d); *Cotton v. King* (e); *Thomas v. Williams* (f); *Blanchet v. Foster* (g); *St. George v. Wake* (h). The latter case also suggests as another ground on which the Court will abstain from disturbing the settlement,—the poor circumstances of the husband (i).

 VICE-CHANCELLOR :—

The bill seeks to set aside a deed executed by the Defendant *Elizabeth Taylor*, before her marriage, as a *fraud [*612] on the marital right of the Plaintiff; and it suggests as a further ground for that relief, that the deed was obtained by a surprise on the Defendant. It was also said, that the deed was plainly improper, and especially the clause which enabled the trustees, at their own will and pleasure, to make advances to the children, and entirely to defeat the wife's interest.

No case for relief has been made out, upon the ground of any fraud upon the wife herself. The allegation, that, at the time of executing the deed, she thought it was a different instrument, is disproved as distinctly as it is possible to disprove such an allegation. [His Honor stated the evidence on this point]. Upon this evidence, and the presumption which the law raises against a party executing a solemn instrument, I have no hesitation in saying that the Plaintiff is not entitled to relief on this ground, even if relief could be given in a suit by the husband alone.

(a) 2 Bro. C. C. 345; S. C. 2 Cox, 28; S. C. 1 Ves. jun. 22.

(b) 1 Ves. & B. 354.

(c) 1 Russ. 490.

(d) 1 Vern. 438.

(e) 2 P. Wms. 358.

(f) Mos. 179.

(g) 2 Ves. 265.

(h) 1 Myl. & K. 623.

(i) Id. 624.

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With respect to the particular clause of the settlement, which has been made the subject of distinct complaint, I will not say whether, if a bill had been filed by the wife for the purpose of rectifying the deed and making it conformable with actual instructions given, the Court would not correct that deed: that is not the object of this bill, which treats the deed as fraudulent and wholly void, and seeks to cancel it.

I proceed, therefore, to consider the case, as it depends on the equity to which the husband has, in some cases, been held entitled, where a settlement has been secretly made by the wife, of her own fortune, during the treaty of marriage, such treaty having terminated in marriage; and in doing this, I think it necessary to explain the ground on which I proceed.

[*618] "It was argued for the Defendants who resist this claim, that the Plaintiff was ignorant, until after the marriage, that the wife was possessed of the property in question; and I was referred to cases, in which the Court had apparently laid some stress on that circumstance, as a ground for refusing relief to the husband. *In De Manneville v. Crompton (a)*, Lord Eldon made the important observation, that, in the absence of any representation having been made as to specific property, no implied contract is raised on the part of the lady, during the treaty of marriage, that her property, as it existed at the time of the commencement of the treaty, shall be in *no way diminished*. This undoubtedly shews Lord Eldon's opinion to be, that it is not every alienation of the wife's property, during the treaty, which can be regarded as fraudulent, only because the husband was not a party to it. But I should certainly have great difficulty in applying the proposition so laid down by Lord Eldon, to a case in which every farthing of the wife's property was, without the knowledge of the husband, wholly withdrawn from his control, and settled on herself, her children, or her appointees, to the total exclusion of the husband. A very special case must be made out before the Court would carry the proposition so far. I think that Lord Eldon meant only to decide, that there being no

(a) 1 Ves. & B. 364.

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implied contract on the part of the lady that her property should not be in any way diminished, it is for the Court to determine, whether, having regard to the condition in life of the parties, and the other circumstances of the case, a transaction complained of by the husband should be treated as fraudulent or not.

I think another argument on behalf of the Defendants was also carried beyond its just limits, in *contending that [*614] actual fraud or deception on the husband must be proved. Notwithstanding there are some dicta which may at first be considered as implying the contrary (but which may, I think, be explained), I take the rule of the Court to be correctly stated in Mr. *Roper's Treatise* (a): "Deception will be inferred if, after the commencement of the treaty for marriage, the wife should attempt to make any disposition of her property without her intended husband's knowledge or concurrence." This way of stating the law does not exclude inquiry into the circumstances by which the apparent deception may be explained, nor does it conflict with the modern cases to which I was referred. I shall, as I understand those cases, content myself with referring to the valuable note of the learned editor of the same treatise (b), in support of the general proposition I have cited.

Several circumstances would certainly appear to have been sometimes thought material as negating the imputed fraud; such as the poverty of the husband—the fact that he has made no settlement upon the wife—the reasonable character of the settlement, as in the case of a settlement upon the children of a former marriage,—and the ignorance of the husband that his wife possessed the property. Upon these I am not called upon to say more than that I am glad to find other grounds upon which to decide the present case. I could not give my individual assent to the sufficiency of any of the reasons I have mentioned. The poverty of the husband—the absence of any settlement upon the wife—the reasonable manner in which she desires to deal with her property, may be very material considerations for the guidance of *the parties [*615]

(b) *Law of Husband and Wife*, vol. 2, p. 162.

(c) Mr. Jacob's note, vol. 2, p. 166 n.

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in determining in what manner the wife's fortune should be settled; but why they should constitute a reason for concealing the arrangement from the husband I cannot comprehend. It might be very proper to bring these considerations to the attention of the intended husband. He might be told that the lady has a certain fortune, but regard being had to the claims upon her and to his circumstances, the settlement ought to be made in a particular way; and upon this statement, if he does not approve of the proposed settlement, the marriage contract may be determined; but I cannot comprehend the reasoning which says that any one of the reasons suggested is a sufficient ground for practising concealment upon the husband, or treats such concealment as immaterial. So also, with respect to the ignorance of the husband of the property of the wife—that, no doubt, materially lessens his disappointment at finding the wife's fortune has been withdrawn from his control; but the equity is not founded upon his disappointment; for, if that were so, it would follow that his ignorance of the existence of the property would always be an answer, however that ignorance was produced: the equity would never arise, where the wife had contrived to conceal her property from the husband;—but this is not so, for the cases clearly shew that practised concealment by the wife will be treated as a fraud on the husband.

I am bound, however, to say, that the facts to which I have adverted,—having been more or less relied on by the Court, in refusing to disturb a secret settlement,—are facts which I ought not to disregard in considering whether this settlement is to be deemed fraudulent or not. And nearly every one of those circumstances enters into the present case. But without calling any one of these [*616] reasons to the aid of my judgment, there is one *fact which determines me in refusing the relief which the husband asks in this suit; and it is, that the husband before the marriage, put it out of the power of the wife effectually to make any stipulation for the settlement of her property. By his conduct towards her, retirement from the marriage was on her part impossible. She must have submitted to a marriage with her seducer, even although he should have insisted on receiving and spending the

1842.—*Lee v. Lee.*

whole of her fortune. The only way in which a woman can insist upon a settlement is, by making it a part of the marriage treaty that her property shall be settled. The husband, by bringing the intended wife to his house, and inducing her to cohabit with him before the marriage, deprived her of the power to protect herself and thereby precluded himself from telling this Court, with any effect, that his wife has committed a fraud upon him, because she has taken the precaution to have her property secured for herself and her children. Adverting to the comparatively slight grounds on which the Court has, in some cases, rested its denial of the equity of the husband in such cases, I am very far within the limits of authority in saying, that a woman, in the view of this Court, commits no fraud on her husband, if, in circumstances like the present, she takes the only means he has left her of protecting herself,—that of making a settlement without his knowledge.

THE bill was dismissed without any order as to costs, (the plaintiff suing in forma pauperis), except the costs of the trustees, which were to be paid out of the fund in settlement.

**LEE v. LEE.*

[*617]

1842: July, 30. November, 4.

In a suit abated by the death of a sole plaintiff, the Court has no jurisdiction to order that his representatives shall revive the suit within a time to be limited by the Court, or that in default of their doing so, the bill shall be dismissed.

THE suit was instituted by a sole Plaintiff, who died before the cause was heard.

Mr. *Bazalgette*, for the Defendants, moved that the representatives of the deceased Plaintiff might revive the suit within a time to be limited by the Court, or, in default of their doing so, that the bill might be dismissed: *Chowick v. Dimes* (a).

(a) 3 Beav. 220.

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VICE-CHANCELLOR —

I have examined the most modern authorities upon this subject. In *Canham v. Vincent* (a), a similar application was made before the *Vice-Chancellor of England*. The representatives of the deceased plaintiff appeared and opposed the motion, and the *Vice Chancellor* refused to make the order. In *Chowick v. Dimes* (b), above referred to, the *Master of the Rolls*, after a search for precedents, made the order which I am now asked to make. In *Dryden v. Walford* (c), a similar application was made before the *Vice-Chancellor Knight Bruce*. His attention was called to the case of *Chowick v. Dimes*, but he refused to follow it. And I am able to state, that the clear and strong opinion he expressed in that case remains altogether unshaken. In a note upon the case of *Chowick v. Dimes* (d), it is stated that the *Vice-Chancellor of England*, upon the authority of *Chowick v. Dimes*, reversed his former order in *Canham v. Vincent*.

[*618] *This state of the authorities forces upon me the necessity of acting upon my own opinion as to the practice of the Court. And, being of opinion that the practice of the Court ought, as matter of abstract justice, to be such as the decision of the *Master of the Rolls*, in *Chowick v. Dimes*, supposes it to be, I should regret having come to the conclusion that I ought not to make the order prayed, were it not that my decision in this case may probably be attended with the beneficial result of causing the question to be brought before the *Lord Chancellor*, whose decision will furnish a rule for every branch of the Court.

The case, it will be observed, is that of a sole plaintiff, whose death necessarily occasions a total abatement of the suit, and leaves no one upon the record against whom the Court can act,—no one who has ever, directly or indirectly, made himself party to the proceedings before the Court. I notice this, because observations apply to such a case, which do not necessarily apply to a case in which one only of a plurality of plaintiffs dies, leaving a co-plaintiff or co-plaintiffs sur-

(a) 8 Sim. 277.

(c) 1 Y. & Coll. Cha. Ca. (n. p.)

(b) Ubi sup.

(d) 3 Beav. 295.

1842.—*Lee v. Lee*.

viving, or in which a sole female plaintiff marries; although even in these latter cases the practice, in my humble judgment, cannot be considered as settled.

Considering the question apart from authority, it appears clear to me, that I can have no right to make the order prayed. The suit being abated, and there being no Plaintiff remaining upon the record,—no one who has ever made himself or been made a party to the suit, there is, in fact, no suit in which I can make an adverse order against any one. There are not, either in form or substance, contending parties between whom an order, adverse to either, can be made. And, unless and until the representatives of the deceased Plaintiff are *compelled to appear, or appear [*619] gratis, or are in default for not appearing, the Court can have no jurisdiction to make any adverse order against them. Now, in fact, they have not appeared. If the relative positions of the Defendants and the representatives of the deceased Plaintiff are such as to entitle the former to compel the latter to appear in the cause, the regular mode of doing so must be by subpoena or other process of the Court. To such process the representatives of the deceased Plaintiff would be bound to yield obedience. But this case would, I believe, stand alone in the practice of the Court, if the Defendants have a right to treat the representatives of the deceased Plaintiff as as being in default for not appearing, (which can be the only ground for acting against them,)—simply because they have not appeared upon a notice of motion given by the Defendants at their own mere will, in a non-existing suit with which those representatives have never in any manner connected themselves. Unless, therefore, authority has established a practice different from that which principle would apparently sanction, I feel satisfied I ought not to make the order.

The authorities bearing upon the subject are, I believe, all cited in *Chowick v. Dimes*, and the notes upon that case. The *Master of the Rolls*, in *Chowick v. Dimes*, acted upon the authority of *Jones v. Masser* (a), *Turner v. Cole* (b), and *Brown v. Warner* (c), and upon the supposed analogy of the cases of defect of suit by the

(a) 3 Beav. 295.

(b) *Ib.*

(c) 3 Beav. 296.

1842.—*Lee v. Lee.*

bankruptcy of a plaintiff, and the abatement of suit by the marriage of a sole female plaintiff.

I cannot find any case in which, upon an abatement of a suit by the death of a sole plaintiff, an order like that in *Chowick v. Dimes* has been made, where the party sought to be affected by the order has appeared and opposed it. The question, therefore, [*620] is open, whether the orders, specially referred to in *Chowick v. Dimes*, could have been made, if the parties had appeared, not submitting to, but for the purpose of protesting against, the jurisdiction of the Court, and opposing the orders being made, —whether those orders, so far as they direct the dismissal of the bill, with or without costs, (upon the other parts of those orders I shall presently observe), have not been orders taken by the parties at their own peril, and to which the attention of the Court was not directed? I have already stated the reasons which induce me to think that the mere order of dismissal in those cases, with or without costs, cannot be regular. But as that is the question to be decided, I cannot, of course, weigh the authority of the cases by those parts of the orders only. But, for the purpose of weighing the authority of the cases, the orders must be taken altogether; and I may well try the regularity of one part of the orders made in those cases by other parts of the same orders, respecting the irregularity of which I believe no doubt can be entertained.

The orders, as I understand them, charge the executors (who have never become connected with the suit) personally with the costs incurred by their testator in his lifetime. This, if it be the effect of the orders, cannot be the result of a deliberate judgment of Lord *Eldon*; and, whether that is the necessary effect of the orders or not, the *Master of the Rolls*, in his judgment in *Chowick v. Dimes*, expresses a manifest disapprobation of the orders cited, so far as they relate to the costs. Indeed, so far as those orders relate to the costs, they appear plainly inconsistent with the well-established practice of the Court, upon a ground distinct from that already referred to. It is a rule of the Court (much complained of, and therefore clearly understood) that a suit cannot [*621] be revived for costs alone, even where those costs have

 1842.—*Lee v. Lee.*

been actually awarded before the suit became abated; nor can such costs be taxed pending the abatement, and they are lost to the party to whom they have been awarded. Whereas, by the cases cited in *Chowick v. Dimes*, it would appear, that the Court may make an original order for payment and taxation of costs, notwithstanding and during an abatement of the suit, that is, without the suit being revived.

The cases cited in *Chowick v. Dimes*, and the notes, except so far as they relate to the dismissal of the bill, (with or without costs), appear to me to be generally regular, but to furnish no analogy for the order asked in this case; and the circumstance that those orders are in part regular, tends much, in my opinion, to fortify the conclusion I have come to, that they may have been in part the order of the Court, and in part the order of the parties without the attention of the Court being directed to that part.

First, as to the cases in which a sole plaintiff has become bankrupt. Bankruptcy, according to the practice in Chancery, renders a suit defective, but does not cause an abatement. The bankrupt plaintiff, however, is placed under an incapacity (permanent or temporary, as the case may be) to prosecute the suit; and, by the non-prosecution of the suit for a given time, the defendant acquires a right to dismiss the bill. In principle there seems to be no positive reason why this should not be done as against the bankrupt, without notice to the assignees. When the Court in such cases (according to what appears to be the modern practice) makes an order that the bill be dismissed, (but always without costs), unless the assignees file a supplemental bill within a limited time, the Court makes no order against the assignees. It merely gives the assignees the benefit of a notice that the bankrupt's defective suit will
 *be dismissed *as against him*, unless the assignees take [*622] proceedings to sustain his original suit. This, which is an indulgent act towards the assignees cannot sanction an order being made against them in an abated suit, to which they are not parties. The language of Lord *Eldon* in *Randall v. Mumford* (a) shews that formerly the court acted against the bankrupt only, in

 1842.—Lee v. Lee.

these cases, obliging him to procure his assignees to act, and to file a supplemental bill, at the peril of having his bill dismissed, if he failed to do so. And *Wheeler v. Malins* (a) is to the same effect.

Next, as to the cases in which injunctions have been in force, at the time the suit became abated. These cases appear to admit of explanation similar to the last. By the abatement of the suit all orders made in it would naturally drop. When, therefore, the Court (before it will permit an injunction to drop on the ground of the suit being abated) gives the representatives of a deceased plaintiff notice, that the injunction will be dissolved unless the suit is revived within a limited time, it makes no order against the representatives; but, as matter of indulgence, merely gives them notice, that the natural consequences of the abatement of the suit will ensue unless they take measures to prevent it. And, when the Court makes an order in the abated suit, that the injunction be dissolved, it decides only, that it will no longer prevent the natural consequences of the abatement of the suit. This is a very different thing from making an adverse order against a person not a party to any existing suit.

In all the other cases, of a suit abating by the death of a sole plaintiff, (except *Burnell v. The Duke of Wellington* [*623] (b)), it will, I believe, be found, that the order was made against a person who, in some way or other, had made himself amenable to the Court, in the suit in which the order was made. The order in *Froward v. Bingham* (c) (a case of the class I have last referred to), being confined to the bill of revivor, and not extending to the original suit, shews the opinion of the Court to have been, that it could not deal with the abated suit. The case of *Adamson v. Hall* (d), in which one of several plaintiffs died, leaving the others surviving, and the cases in which a person has married a sole female plaintiff, do not necessarily furnish a precedent for a case like that before me, in which the party to be affected by the order is, both in form and substance, a stranger to the record. But, with respect even to those cases, considering how little the subject has been discussed, I cannot help doubting their regularity, regard being had to

(a) 4 Madd. 171.

(b) 6 Sim. 461.

(c) T. & R. 258.

(d) 4 Sim. 483.

 1842.—Earl of Glengall v. Bland.

the known effect of an abatement of suit upon the right to costs. And, if in that respect the orders are irregular, it cannot, under the circumstances, but shake their authority altogether. *Burnell v. The Duke of Wellington* was decided by the same Judge who afterwards decided *Canham v. Vincent*.

I trust this case will be brought to the attention of the *Lord Chancellor*; and if the *Lord Chancellor* should not uphold the decision in *Chowick v. Dimes*, and should be of opinion that the practice of the Court requires amendment in the particular under consideration, no difficulty can be experienced in making such an amendment.

I make no order upon the motion.

 EARL OF GLENGALL v. BLAND.

[*624]

1842: Nov. 22.

An order to set down for argument exceptions to the Master's report of insufficiency obtained after service of an order for leave to amend, and for the defendant to answer the amendments and exceptions together, is irregular.

The *Vice-Chancellor* cannot, without special authority, hear a motion to discharge an order of the *Lord Chancellor*, though made, of course, as upon petition, and therefore the *Vice-Chancellor* cannot, without such authority discharge an order to set down exceptions for argument.

EXCEPTIONS were taken to the answer and submitted to. A further answer was put in. The answers were then referred for insufficiency on the old exceptions. The Master allowed some of the exceptions. The Plaintiff then obtained and served the common order for leave to amend, and for the Defendant to answer the amendments and exceptions at the same time. The Defendant excepted to the Master's report, and obtained the order of the *Lord Chancellor* upon petition to set down the exceptions. The Plaintiff's order was served on the Defendant on the same day, but before that the Defendant's order was obtained.

1842.—*Earl of Glengall v. Bland.*

Mr. *Temple* and Mr. *Tripp*, for the Plaintiff, moved that the order to set down the exceptions for argument might be discharged with costs for irregularity.

They relied on *Farquharson v. Balfour* (a), which decided, when the order to answer the amendments and exceptions together is served, the exceptions to the report cannot be set down: 1 *Dan. Chan. Pr.* 528.

Mr. *James Parker*, for the Defendant.

The order to set down the exceptions was obtained the same day as the order to answer was served; and the Court will not notice the priority of the steps taken on the same day. The exceptions were, in fact, put in on the preceeding day, and although they could not be set down without the order for that purpose, [*625] yet the Defendant should have the benefit of them in point of time: *Leyburn v. Green* (b).

The present motion is wrong, inasmuch as it asks the *Vice-Chancellor* to discharge an order of the *Lord Chancellor*: 5 *Vict. c.* 5, s. 22; *Saunders v. King* (c); *Whitehouse v. Hickman* (d).

Mr. *Temple*, in reply.

The orders of this Court, whether made by the *Lord Chancellor* or the *Vice-Chancellors*, are, in effect, the *Lord Chancellor's* orders. The objection, if it prevails, will prevent the *Vice-Chancellor* from discharging any order once made.

THE VICE-CHANCELLOR said he could not discharge the order without the authority of the *Lord Chancellor* to entertain the motion.

On the application of Mr. *Temple*, the LORD CHANCELLOR directed the motion to be heard before the *Vice-Chancellor*.

(a) *Jac.* 587.

(c) 2 *Jac. & W.* 429.

(b) 2 *Russ.* 377.

(d) 1 *Sim. & St.* 104.

 1842.—*Lynch v. Lechesne*.

THE VICE-CHANCELLOR said he was bound, by the authority of *Farquharson v. Balfour*, to make the order asked by the motion; but, as the motion was irregularly brought before him in the first instance, and the practice he was required to uphold was of the strictest character, the order would be made without costs.

*LYNCH v. LECHESNE.

[*626]

1842: December, 5, 6.

A sole defendant, who is specially interrogated to the matter of the bill, and who has taken an office copy of the bill containing the interrogatories, is not exempted from answering the same, on the ground that the interrogatories are not numbered or specified in a note at the foot of the bill.

The answer of a defendant not answering any of the interrogatories of the bill, and which was put in after the time for answering had expired and an order for further time had been obtained, ordered to be taken off the file.

Semble, the 17th, 18th, and 19th Orders of August, 1841, do not apply to a suit, where there is only one defendant.

THE bill was filed in July, 1842, against a sole Defendant, and after stating the matter of complaint, proceeded:—"To the end, therefore, that the Defendant may, if he can, shew-why your orator should not have the relief hereby prayed, and may upon his corporal oath, and according to the best and utmost of his knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to all the several interrogatories hereinafter set forth,—that is to say,"—then followed the interrogating part of the bill, containing various interrogatories, which were not numbered, nor was there any note at the foot in the form specified in the Order XVII. of August, 1841.

The Defendant took an office copy of the whole bill, including the interrogating part; and the time for answering having expired, he, on the 12th of October, 1842, obtained an order for further time to answer, which time expired on the 2nd of November. An attachment for want of answer issued on the 14th of November. The Defendant afterwards put in an answer in the following terms:—

 1842.—Lynch v Leceane.

"This Defendant, saving, &c., denies that the said complainants are entitled to all or any of the relief in and by their said bill prayed against this Defendant, without this, that, &c.

It was now moved for the Plaintiff, that the document or writing filed by the Defendant on the 17th of November, in the [*627] record and writ clerk's office, *purporting to be the answer of &c., might be taken off the file of records as delusive and evasive, with costs.

Mr. *Locat* and Mr. *Selwyn*, for the motion, said, that the case must be governed by the practice of the Court as established by a series of cases arising upon illusive pleadings, and that it was not affected by any recent Orders. They cited *Tomkin v. Lethbridge (a)*, *Thomas v. Lethbridge (b)*, *Smith v. Serle (c)*, *Marsh v. Hunter (d)*, *Brooks v. Purton (e)*.

Mr. *Blunt*, for the Defendant.—The case should not be affected by the order for time, for that order was rather the consequence of the office copy of the bill having been erroneously delivered out, with the interrogatories, whereas, there being no numbers to the interrogatories, and no note at the foot requiring the Defendant to answer any of them, the copy should have been delivered out, without the interrogatories. The order for time was taken out in vacation, when the Defendant had no opportunity of being advised on the effect of the late Orders.

The 16th Order of August, 1841, expressly directs that a defendant shall not be bound to answer any interrogatory, except those which such defendant is required to answer: the 17th Order points out how the plaintiff is to signify to what interrogatories he requires an answer: the 18th Order makes that note a necessary part of the bill; and the 19th Order specifies the form by which the answer is distinctly restricted to the interrogatories which are num- [*628] bered and pointed out by the note. *The Plaintiff is not at liberty to disregard these forms, and, after adopting

(a) 9 Ves. 178.

(b) Id. 463.

(c) 14 Ves. 415.

(d) 3 Madd. 437.

(e) 1 Y. & Coll. Ch. Ca. 278.

 1842.—Lynch v. Lescene.

another form, creating ambiguity, complain that the Defendant has been irregular, because he has not understood the meaning of it. The object of these orders is to indicate clearly to the Defendant, what discovery the Plaintiff requires from him; and where there is no such indication, the Defendant is justified in believing that the Plaintiff intends to prove his case, as he may do, without requiring any admission.

Mr. *Lovat*, in reply.—The 17th, 18th, and 19th Orders of August, 1841, are applicable only to cases where there are several defendants. Both the language and the sense of the Orders shew this to be their true meaning. The *Master of the Rolls* has put this construction upon those Orders, in a case which was lately before him.

VICE-CHANCELLOR :—

I have made inquiry with respect to the case in which I was told that the *Master of the Rolls* had decided that the Orders of August, 1841, on the numbering of interrogatories, did not apply to the case of a single defendant. I am informed that the case before the *Master of the Rolls* did not call for, and that his Lordship did not make any, such decision. It was a case of a sole defendant, the plaintiff had literally complied with the terms of the Order, by numbering the interrogatories, and the question was, whether he had done so as “conveniently as might be?” The *Master of the Rolls* decided only that, where there was only one defendant, it was immaterial in what way the interrogatories were numbered; which, in effect, decided that, as to a sole defendant, the Order was, in that respect, nugatory. If I were *compelled to de- [*629] cide the point, I should say that the 17th, 18th, and 19th Orders do not apply to the case of a single defendant,—a case in which the provisions they contain are necessarily nugatory. The language of the Orders alone, which clearly suppose a plurality of defendants, would justify such a construction of them.

The application in this case is, that the answer may be taken off

1842.—*Lynch v. Leese*.

the file ; and an order to that effect I take to be the practice of the Court, and the right of the Plaintiff, where a defendant having taken out an order for time to answer, or to plead, answer or demur, not demurring alone, attempts, as this Defendant has done, to evade the requisition of the order, by a pleading which, though a literal compliance with the order, is merely illusive (a). The question, therefore, is, whether the Defendant is protected from this consequence, by the effect of the Orders of August, 1841.

The language of the 16th Order has no reference to the forms pointed out in the subsequent Orders, with regard to numbering and distinguishing the interrogatories which are to be answered by each defendant. The 16th Order only relieves the defendant from answering statements or charges which are not specially interrogated to ; and thereby takes away the opportunity which a Plaintiff previously had, in the case of injunction bills, of laying a trap for an exception, by omitting to interrogate to particular statements. If the Orders had stopped here,—If the 16th Order was the only Order on the subject,—it is plain that the Defendant would not be excused from answering, in this case, by any thing which is found in that Order.

Passing over the 17th Order, it is plain that the 18th,
[*680] *which says only that the note at the foot of the bill shall be treated as part of the bill, can have no application to this bill which does not contain that note. The 19th Order prescribes a form for the commencement of the interrogating part of the bill, which, I may observe, is, in its terms, applicable to several Defendants, and which, when it is used, indicates precisely the questions which the Defendants are severally required to answer. That is not the form which the Plaintiff has adopted in this case ; and the Defendant cannot therefore be relieved from answering these interrogatories by any construction of the 19th Order. His argument must be, that the omission of the Plaintiff to observe the forms prescribed by the 18th and 19th Orders, exonerates the Defendant from answering the interrogatories. I do not admit the argument to

(a) 2 Dan. Ch. Pr. 80.

1842.—*Lynch v. Leese*.

have any foundation, but an answer to it in this case I will presently give.

The only Order upon which any question can arise is the 17th Order. [His Honor read the Order.] This Order directs, first, that the bill shall be framed in a certain way, and shall specify the interrogatories, which *each* defendant is required to answer. On this part of the Order, I need only say, that, if the Defendant considered this bill to have been irregularly framed, he has not taken the proper course for bringing that irregularity to the notice of the Court. The latter part of the Order consists of a direction to the officer of the Court, to whom the preparation of the office copies belongs, as to the form of copy he is to deliver out to each defendant. In this case the Defendant, in order to raise the question which he has now raised, should have refused to take any office copy of the interrogatories. That refusal would have rendered it necessary for the Court expressly to decide whether the Order applies to a sole defendant. The officer, however, gave out, and the Defendant took an office copy of the entire bill, includ- [*631] ing the interrogatories; and the sole question then is, what are the interrogatories to which he is specially interrogated,—and those, I am of opinion, he is bound to answer, whether they are or not numbered or referred to in any note.

There is, however, a still more satisfactory ground on which this case may be determined. It is obvious, that in the situation of the Defendant,—the time for answering having expired,—no Master would have attended to his application for time to answer, if he had been informed that the purpose of the Defendant was to answer in this evasive form. In the case of *Brooks v. Purton* (a), a plea was ordered to be taken off the file, after time to answer had been obtained, on the ground that the plea was not an answer in the ordinary sense which was intended, and for which the time had been granted: and this is certainly not such an answer as the order obtained in this case could possibly be understood to sanction. If the Defendant was ever in a condition to refuse to answer the bill in re-

(a) 1 Y. & Coll. Ch. Ca. 278.

 1842.—Kilminster v. Pratt.

spect of its form, he has, in the circumstances of this case, waived the right by obtaining the order for time.

The motion must be granted ; and on the ground that the answer is an abuse of the indulgence of the Court upon which the order for time proceeded, the Defendant must pay the costs.

[*632]

*KILMINSTER v. PRATT.

1842 : December 5.

One of two Co-Plaintiffs having become bankrupt, and the other appearing on the motion of the Defendant to dismiss for want of prosecution, and declining to proceed with the cause, the bill was dismissed, with costs.

MR. BEVIR moved to dismiss the bill for want of prosecution. There were two Plaintiffs. The replication had been filed in April, 1842, and in May the subpoena to rejoin was served, and the order issued for a commission, which was returnable the first day of Michaelmas Term. In June one of the Plaintiffs became bankrupt, and no further steps had been taken in the cause. He cited *Caddick v. Masson* (a), *Latham v. Kenrick* (b). The Plaintiffs had not proceeded with their commission, but they could not abandon it and thereby withdraw the case from the 17th Order, and bring themselves under the old practice : *Rayson v. Lees* (c).

Mr. Elderton, for the solvent Plaintiff, opposed the motion, and cited *Adamson v. Hall* (d) ; *Chichester v. Hunter* (e).

(a) 1 Sim. 501.

(b) Id. 582, n.

(c) 1 Keen, 16. Plaintiff undertaking to set down the cause, as against the defendant *Lees*, within a fortnight, and not to examine any witnesses except to prove the deed of disclaimer in &c., Court makes no order on the motion to dismiss &c., but orders that the plaintiff do pay the costs of the motion. Reg. Lib. B: 1835, fo. 306.

(d) T. & R. 258. S. C. reported as *Adamson v. Hull*, 1 S. & St. 249.

(e) 3 Beav. 491.

1842.—Needham v. Needham.

THE VICE-CHANCELLOR inquired, whether the solvent Plaintiff would undertake to proceed in the cause.

Mr. *Elderton*, for the Plaintiff, declined to proceed.

THE VICE-CHANCELLOR made the order the dismiss the bill with costs.

*NEEDHAM v. NEEDHAM.

[*633]

1842: Dec. 8.

Where a decree directing an act to be done, has been drawn up without fixing a time within which the act is to be done, the decree is not rendered ineffectual by the operation of the 11th and 12th Orders of August 1841, but the Court will, upon motion for that purpose, fix a time for the performance of the act. Order made upon motion, fixing a time for the performance of an act, which a decree, made upon a bill taken pro confesso, had ordered to be done.

THE decree in this cause, made on the 2nd of July, 1842, was drawn up in the following form:—

“ This Court doth declare, that a breach of the trust contained in the will of, [&c.], deceased, has been committed by the said *Samuel Ellis Bristowe*, and that such breach of trust was committed at the instigation and request of the Defendant, *Francis Henry William Needham*, against whom the Plaintiff's bill is taken pro confesso, by order dated the 9th of May, 1842. And this Court doth order and decree that the said Defendants do restore and replace the trust-funds in the pleadings mentioned, with liberty for the said Defendants, or either of them, to apply to the Court, upon the said funds being so replaced.”

The Defendants not having obeyed the order, the Plaintiffs now moved that the said Defendants might be respectively ordered to act in obedience to the decree, by restoring and replacing the said trust-

1842.—*Needham v. Needham*.

funds therein ordered to be restored and replaced by the said Defendants, on or before the 10th day of January, 1843.

Mr. *Calvert*, for the motion.

Mr. *Wright*, for the Defendant *Needham*, said, that the decree was inoperative, for, not being in the form prescribed by the 12th amended Order of the 26th of August, 1841, the Plaintiffs could not avail themselves of the compulsory process given by the 11th of the same Orders. The decree having been taken pro [*634] confesso against *Needham*, and being ineffectual in the form in which it was taken, could not be amended in the manner now sought.

Mr. *Calvert*, in reply.—The Court may make the four-day order under the old practice. The decree was taken in its present form as an indulgence to the Defendants.

THE VICE-CHANCELLOR said the four-day order ought not to be made, where, as in this case, the defendant was not in default; but that the Court might then order the Defendant to perform the decree in a given time, and that his failure to comply with that Order would be a default, on which the Plaintiff might afterwards act.

Motion granted.

MEMORANDA.

On the 29th of October, 1841, *James L. Knight Bruce*, Esq. Q. C., was appointed Vice-Chancellor and afterwards received the honour of Knighthood, and was appointed a Member of Her Majesty's Privy Council.

On the 30th of October, 1841, *James Wigram*, Esq., Q. C., was appointed Vice-Chancellor, and afterwards received the honour of Knighthood, and was appointed a Member of Her Majesty's Privy Council.

1842.—Needham v. Needham.

On the resignation of the Right Honourable Sir *John Bernard Bosanquet*, Knight, in Michaelmas Vacation, 1841, *Cresswell Cresswell*, Esq., Q. C., having been previously called to the degree of Serjeant-at-law, was "appointed a Judge of the [*635] Common Pleas, and received the honour of Knighthood.

In Hilary Term, 1842, the following gentlemen were appointed Queen's Counsel :—*Edward Wilbraham*, Esq.; *Wilkinson Mathews*, Esq.; *John Herbert Koe*, Esq.; *John Godfrey Teed*, Esq.; *William Loftus Lowndes*, Esq.; *Thomas Purvis*, Esq.; *John Walker*, Esq.; *Kenyon Steven Parker*, Esq.; *James Russell*, Esq.; *Thomas Oliver Anderdon*, Esq.; *Robert Prioleau Coupell*, Esq.; and *Lof. tus Tottenham Wigram*, Esq.

Thomas Pemberton, Esq., was appointed Attorney-General of His Royal Highness the Prince of Wales.

In February, 1842, *Francis Stack Murphy*, Esq., in Trinity Vacation, *Herbert George Jones*, Esq., and in Michaelmas Term, *Alfred Septimus Dowling*, Esq., were respectively called to the degree of Serjeant-at-law.

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In a suit by residuary legatees of *A.* against the personal representatives of *B.*, who was the executor of *A.*, for payment of a debt due from *B.* to *A.*, the amount of which was not admitted, and also for an account of the personal estate of *A.*, praying also, unless assets were admitted, an account of the personal estate of *B.*, and that being insufficient, seeking to charge his real estate:—*Held*, that the Plaintiff was not entitled to a declaration, that a particular debt or sum constituted an item in the account to be taken, but that evidence tending to show that the Defendant should be charged with such particular debt or sum—was admissible.

Tomlin v. Tomlin, 236

The cases of *Law v. Hunter*, *Hornby v. Hunter*, and *Walker v. Woodward* observed upon. *Ib.*

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ADMINISTRATION.

See RECEIVER, 2, 3, 4.

In a suit by a simple contract creditor, whose debt was secured by a deposit of deeds by way of equitable mortgage, against the executors and devisees of the debtor, the mortgaged premises were sold, and were not sufficient to pay the Plaintiff's debt. The general assets of the testator were insufficient to pay his debts and the costs of suit. The parties beneficially entitled under the devise by their answer disclaimed, but the bill was not dismissed against them:—*Held*, that the Plaintiff as equitable mortgagee was entitled to the proceeds of the sale of the mortgaged premises, and the executors of the testator were entitled to retain in full out of the general assets the debts owing to them by the testator, and that the residue of the assets should be applied in the following order:—in payment,—first, of the costs of the

executors, as between solicitor and client; secondly, of the costs of the Plaintiff (including those of the purchaser, which the Plaintiff was ordered to pay); thirdly, of the costs of the Defendants beneficially entitled under the devise; and, fourthly, of the debts remaining due to the Plaintiff and the other creditors. *Tipping v. Power*, 405

ADMISSIONS.

See EVIDENCE, 3, 4, 5.

AFFIDAVIT.

See EXHIBIT, 2.

1. *Semble*, the affidavit in support of the application to withdraw replication and amend, under the 15th Order of 1828, should specify the nature of the proposed amendments. *Phillips v. Goding*, 40
2. *Semble*, the affidavit by the Plaintiff himself of the materiality of the discovery sought cannot be dispensed with, on the motion to extend the common injunction, unless sufficient reasons for the absence of such affidavit be assigned. *Scotson v. Gaury*, 99
3. Upon a motion for the production of documents described in a schedule to the answer, and admitted to be in the Defendant's possession, liberty will be given to the Defendant to file an affidavit as a ground for qualifying the order for production, by permitting him to conceal such parts of the documents as do not relate to the subject of the suit. *Curd v. Curd*, 274
4. *Semble*, on a motion to produce documents, the affidavit of the Defendant is admissible to shew that the documents are within any ground upon which the Defendant is entitled to withhold the production. *Llewellyn v. Badeley*, 527
5. *Quære*, whether an affidavit might not be received in support of the motion for preliminary inquiries where the answer simply stated ignorance of the Plaintiff's title? *Topham v. Leghbody*, 269

AGENT.

See RECEIVER, 1.

AGREEMENT.

A debtor effected an insurance on his life, one condition of the policy being that, if it should be assigned bona fide, the assignee should have the benefit of it, so far as his interest extended, notwithstanding the assured should commit suicide: he deposited the policy with his creditor, accompanied by a letter promising to assign it to him, when requested, as a security for his debt. No notice of the assignment was given to the assurers.—*Held*, that inasmuch as the deposit of the policy, and the agreement to assign it by way of security for a debt, constituted in equity a valid assignment as between the parties to the transaction, it was also an effectual assignment within the condition as against the assurers. *Cook v. Black*, 390

AMENDMENT.

See COSTS 1, 2.—EXCEPTIONS, 1, 2, 3, 4, 7.—REPLICATION, 1.

ANSWER.

See COSTS, 3.—DISCOVERY.—EXCEPTIONS, 1, 4.—INTERROGATORIES, 2.

The answer of a defendant not answering any of the interrogatories of the bill, and which was put in after the time for answering had expired, and an order for further time had been obtained, ordered to be taken off the file. *Lynch v. Leccsne*, 636

APPEARANCE.

See ATTACHMENT.

1. An appearance cannot be entered for a defendant under the 8th Order of August, 1841, where the subpoena was served before the orders of August, 1841, came into operation, and was, therefore, not served according to the 14th Order. *Gregory v. Gregson*, 106
2. An affidavit that the deponent has inquired of and been informed by the clerk in court, and the deponent believes it to be true, that no appear-

- ance has been entered by the Defendant, is sufficient to satisfy the Court of that fact. *Tatham v. Williams* 159
3. It is necessary, in applications under the 8th Order of August, 1841, that the affidavit of service of the subpoena should state that the memorandum, in the form prescribed by the 14th Order, was at the foot of such subpoena—*Semble* *Ib.*

ARTICLES BEFORE MARRIAGE.

1. On the proposed marriage of the infant daughter of one who was non compos mentis, a petition was presented to the *Lord Chancellor*, under the stat. 4 Geo. 4, c. 76, s. 17, for his consent, in order to obtain a license. The petition was referred to the Master; and the intended husband, by affidavit, stated that he had agreed to make a certain settlement. The Master reported in favour of the marriage, and the report was confirmed. The parties did not avail themselves of the consent of the *Lord Chancellor*, but shortly afterwards married, under the act 6 & 7 Will. 4, c. 86, without the license. The settlement mentioned in the affidavit was not made,—the parties having entered into articles for a different settlement:—*Held*, that the proposal laid before the Master amounted to a contract, which, in the absence of any settlement properly substituted for it, the Court would enforce. *Cook v. Fryer*, 498
2. *Semble*, it was not incompetent to the parties before the marriage to vary bona fide the terms of the contract, notwithstanding it had been approved by the Court. *Ib.*

ASSIGNEE.

See Costs, 5, 6, 7.

ASSIGNMENT.

See AGREEMENT. — FORFEITURE. — INJUNCTION, 4.—*NOTICE*, 4, 6.—*PRIORITY*.

1. Assignment of funds by a prisoner on a charge of felony to secure payment of an antecedent debt, and costs

to be incurred in his defence, established, notwithstanding his subsequent conviction. *Perkins v. Bradley*, 219

2. A deed of assignment by way of mortgage of a ship together with her tackle, and appurtenances, and all oil, head matter, and other cargo, which might be caught or brought home in such ship, is against the assignor, a valid assignment in equity, as well of the future cargo to be taken during the particular voyage, as of the cargo (if any) which existed at the time of the assignment. *Langton v. Horton*, 549
3. The ship was on her voyage at the time of the assignment; the parties sent notice of the assignment to the master of the ship, and the master delivered up possession of the ship and cargo to the mortgagees, immediately after her return from the voyage:—*Held*, that the equitable title of the mortgagees to the cargo was perfected, and could not be defeated by a judgment creditor of the assignor, who afterwards sued out a writ of *fi. fa.*, and proceeded to take the ship and cargo in execution. *Ib.*

ATTACHMENT.

See PRISONER.

The 8th Order of August, 1841, is not imperative: a plaintiff may notwithstanding proceed, according to the old practice, to enforce appearance by attachment. *Collins v. Brown*, 315

ATTORNEY-GENERAL.

See Costs, 4.

AWARD.

See MOTION, 1.

1. An award, as between partners, providing for the application of the partnership assets, if there should be a surplus, but not providing for the event of a deficiency, is not necessarily invalid: for the Court, in support of the award, may, in a proper case, intend that the state of the assets is such as to render the latter provision unnecessary. *Wilkinson v. Page*, 276

2. An award in other respects valid, is not rendered invalid owing to the nature of the remedy to which the parties are left, in order to enforce obedience to the award, provided the remedy be sufficient. *Ib.*
3. An award (under an order of reference in a cause seeking an account) in question between the parties to be taken, without ordering payment of the balance which shall be found due, is not, therefore, bad; for the Court may enforce payment of such balance in the cause. *Ib.*
4. A sum of money, constituting an item in an account, being one of the matters in reference, the arbitrator directed the accounts to be taken, and the sum in question to be paid at a certain time, without reference to the state of the accounts at that time:—*Semble*, this does not necessarily affect the validity of the award. *Ib.*
5. Among the matters referred to an arbitrator, was the question, whether *W.* or *P.* ought to be ultimately liable upon a promissory note, of which *P.* was the maker, and *W.* an indorsee, as surety for *P.*; and whether *P.* was entitled to an indemnity from *W.* against the liability of *P.* to pay the note when it became due? The arbitrator, by his award, among other things, declared that the liabilities of *P.* on the note, as between *P.* and *W.*, should remain unaffected by the award:—*Held*, that the award was not final, and was therefore bad. *Ib.*

BANK OF ENGLAND.

The Bank of England ought not to be made a party to a suit for the purpose of giving effect to a charge upon stock standing in the name of a felon convict. *Perkins v. Bradley*, 219

BANKRUPTCY.

See DISMISSAL, 3.—JURISDICTION, 1, 2.

BARON AND FEME.

See ARTICLES BEFORE MARRIAGE.
HUSBAND AND WIFE.

BILL. 1

See INFANT.—INTERROGATORIES.

It is not necessary to serve an office copy of the bill upon a party to the suit, under the 23rd Order of August, 1841, in order that he may be bound by the proceedings in the cause. An examined copy of the bill is sufficient. *Blew v. Martin*. 150

CHARITY.

The Court ought not to decree the sale of a charity estate, except upon a very special case; and so much of an information as sought to obtain an inquiry preparatory to that decree, in the absence of any special case for it, was dismissed. *Attorney-General v. The Mayor, Aldermen, and Burgesses of Newark-upon-Trent*, 395

COMPUTATION OF TIME.

See SUNDAY.

CONSENT.

See ARTICLES BEFORE MARRIAGE.

CONSTRUCTION.

See DEVISE.—LEGACY.—PLEA.—STATUTES.—WILL.

CONSTRUCTIVE NOTICE.

See NOTICE.

CONSTRUCTIVE TRUST.

See TRUST.

CONTINGENT LEGACY.

See LEGACY.

CONTRACT.

See AGREEMENT.—ARTICLES BEFORE MARRIAGE.—ASSIGNMENT.—MINES.

CO-PLAINTIFFS.

See DISMISSAL, 3.

COSTS.

See ADMINISTRATION.—DECREE, 1.—INTERPLEADER, 1.

1. The Court will not, at the hearing of the cause, without a special application order the Plaintiff to pay the additional costs occasioned by a case made and allegations inserted in the original bill, which was struck out

- and abandoned by amendment. *Mounsey v. Burnham*, 22
2. The most convenient time for applications in respect of such costs, is immediately upon the cause of complaint arising; and the amount of the costs complained of, is material in reference to the propriety of the application. *Ib.*
3. A. insisted by his answer that B., a claimant of the property in question, should be a party; B. on being made a party stated by his answer that he had given notice of disclaimer to A. before the suit began, but did not enter into evidence: the Court cannot determine the question of costs on the answers, but may direct an inquiry to ascertain when the notice of disclaimer was given. *Perkins v. Bradley*, 219
4. The Attorney-General on behalf of the Crown—Defendant in a suit, claiming an interest in the goods of a felon convict, the subject of the suit, against purchasers for value, and failing in that claim, is not entitled to his costs out of the fund, as a matter of course. *Ib.*
5. The provisional assignee of the Insolvent Court, made a Defendant in a cause in respect of his interest in the property of an insolvent debtor assigned under the statute, is in the same situation with respect to costs, as the insolvent debtor himself would have been; and therefore, on a bill of foreclosure, the mortgagor being an insolvent debtor, and the equity of redemption vested in the provisional assignee, the provisional assignee is not entitled to his costs from the Plaintiff. *Appleby v. Duke*, 303
6. The official assignee and the creditor's assignee of a bankrupt who are necessary parties to a suit for foreclosure in respect of their interest in the equity of redemption of premises of which the bankrupt was the mortgagor, and which are an insufficient security for the amount of the mortgages thereon, are not entitled to their costs of the suit from the Plaintiff. *Cash v. Belcher*, 310
7. In a creditor's suit, the assignees of a bankrupt, who is a defaulting executor of the deceased debtor, are not entitled to their costs of the suit out of the testator's estate; but if the Plaintiff sought to charge the assignees with the receipt of specific parts of the testator's estate, and failed to do so, the assignees might be entitled to costs. *Massey v. Moss*, 319
8. The Plaintiff, in interpleader must bear the costs of any proceedings which he may take in the suit that are productive of needless expense; and, therefore, where the Plaintiff filed unnecessary affidavits, and entered into evidence in the cause, and obtained a second injunction ex parte to restrain proceedings at law, when no such proceedings were threatened, he was ordered to pay the costs thereby incurred. *Crauford v. Fisher*, 436
9. Under a direction by will to accumulate and lay out a certain sum of money in the purchase of land to be settled to uses thereby declared, the costs of the investment are to be paid out of the particular sum directed to be invested. *Gwyther v. Allen*, 505
10. A party to a cause, for whose benefit, in common with others, the cause has been prosecuted, cannot avail himself of the benefit resulting from the suit, discharged of the expenses of it, although he might have been made a party without his authority. *Hall v. Laver*, 571
11. The employment of a solicitor in business relating to a trust estate, by the authority of the trustee, or of some of several cestui que trusts, gives the solicitor no lien or charge upon the trust estate, or upon the shares of the other cestui que trusts. *Ib.*
12. The lien of the solicitor upon a fund recovered in a suit which he has conducted, is confined to the costs of that particular suit; and, therefore, *semble*, a solicitor who, in relation to the same estate, in which, the same parties are interested, has brought an ejectment, and a suit in equity, has no lien upon the fund recovered in the suit for his costs of the ejectment. *Ib.*
13. It being admitted by the Defendants in a suit against executors and

parties charged with misapplying the trust property, that an account had been settled between the residuary legatee, the executor, and the other Defendant, upon an erroneous footing, by which the other Defendant was benefitted, and the residuary legatee was prejudiced, the Court, on dismissing the bill of the residuary legatee, on the ground that he had no title to the relief prayed, did so without costs. *Portlock v. Gardner*, 594

COURT OF REVIEW.

See JURISDICTION, 1.

COVENANT.

See FORFEITURE, 3.—LEASE.—MINES.—SPECIFIC PERFORMANCE, 6, 7

CREDITOR'S SUIT.

See ADMINISTRATION.—COSTS, 7.

DEBT.

See ADMINISTRATION.

Decree for account in a creditor's suit, seeking to charge the real and personal estate of the testator, where the debt of the Plaintiff was admitted by the executors and trustees, and by such of the parties beneficially entitled as were *sui juris*, but one Defendant was a married woman, and another an infant, and there was no evidence of the debt, except the admission. *Hughes v. Eades*, 486

DE BENE ESSE.

1. An *ex parte* order for the examination de bene esse of a witness about to go abroad is irregular. *M'Intosh v. Great Western Railway Company*, 328
2. A motion to suppress depositions taken under an order for the examination of a witness de bene esse, not asking to discharge that order, is not supported by showing circumstances from which it would merely appear that the order was irregular; for the Court will assume, for the purpose of the motion, that the order was regular. *Id.*

DECREE.

See ACCOUNT.—MOTION, 2.

1. The form of the decree, on dismissal of a bill with costs, ordered to be altered by adding the words "*to be paid by the Plaintiffs*;" with reference to the 1st Order of the 10th of May 1839, giving a remedy by *fiari facias* or *elegit* for costs ordered to be paid. *Taylor v. Jardine*, 316
2. Where a decree directing an act to be done, has been drawn up without fixing a time within which the act is to be done, the decree is not rendered ineffectual by the operation of the 11th and 12th Orders of August, 1841, but the Court will, upon motion for that purpose, fix a time for the performance of the act. *Needham v. Needham*, 633

DEMURRER.

A trustee will be restrained by this Court from using the legal powers that have been conferred upon him otherwise than for the legitimate purposes of his trust, and therefore a demurrer for want of equity cannot be sustained to a bill seeking such relief, although the Plaintiff may have a remedy at law. *Balls v. Strutt*, 146

DETAINER.

See PRISONER.

DEVISE.

Devise to a corporation and other trustees upon trust to distribute the rents and profits annually, on a certain day, amongst certain families, according to their circumstances, as in the opinion of the trustees they might need such assistance, whose names were thereafter mentioned, *viz.* (naming twenty-four persons);—*Held*, first, not necessarily void for uncertainty; secondly, not void as tending to create a perpetuity; and, thirdly, a beneficial interest in persons who might lawfully take land by devise, and therefore not void

within the Statute of Mortmain.
Liley v. Hey, 580

DISCLAIMER.

See ADMINISTRATION.—Costs, 3, 5, 6.
RECEIVER, 6.

1. The Plaintiff, who was entitled to tithes arising on the Defendant's land, served the Defendant with notice that he had, by a certain indenture and lease, demised those tithes for a term of years. The Plaintiff afterwards filed the bill for an account of the same tithes. It appeared that the lessee disclaimed all interest in the tithes; and the lessee also put in a disclaimer in the cause.

Held,—that upon the disclaimers the Court might safely make a decree upon the evidence then before it, without directing an inquiry with reference to the alleged demise.
Mounsey v. Burnham, 15

2. Where, in a suit for small tithes, by the vicar, against occupiers, the rector is a Defendant and disclaims, the Court may use the disclaimer for the purpose of founding upon it a decree for the particular tithes demanded by the Plaintiff in the suit, but not for the purpose of proving the right of the vicar to such tithes.
Salkeld v. Johnston, 196

DISCOVERY.

See PRODUCTION OF DOCUMENTS.

- A party having deposited with his bankers an annuity deed, together with other instruments, as security for the balance of his banking account, cannot, by his answer to a bill seeking to have the annuity deed cancelled, and the other securities first applied in satisfaction of the banker's claim, protect himself from answering as to such other securities, by alleging that they are his own title-deeds, in which the plaintiff has no interest. *Duncombe v. Davis*, 183

DISMISSAL.

See REPLICATION, 2.

1. The arrears of rent and amount of costs brought into Court by the Plain-

tiff, in a suit to redeem a lease forfeited by non-payment of rent, must, if the bill is dismissed, be repaid to the plaintiff—*semble*. *Bowser v. Colby*, 109

2. In a suit abated by the death of a sole Plaintiff, the Court has no jurisdiction to order that his representatives shall revive the suit within a time to be limited by the Court, or that in default of their doing so, the bill shall be dismissed. *Lee v. Lee*, 617

3. One of two Co-Plaintiffs having become bankrupt, and the other appearing on the motion of the Defendant to dismiss for want of prosecution, and declining to proceed with the cause, the bill was dismissed, with costs. *Kilminster v. Pratt*, 631

DISTRINGAS.

See STATUTES, CONSTRUCTION OF.

DOWER.

See IMPLICATION.

EJECTMENT.

See COSTS, 12.—INJUNCTION, 4.

EVIDENCE.

See ACCOUNT.—AFFIDAVIT.—DEBT.—EXHIBIT.—PRODUCTION OF DOCUMENTS, 2.—SPECIFIC PERFORMANCE; 1, 7.—TITHES.

EXCEPTIONS.

1. Where secondary evidence is admitted to prove the contents of a lost instrument, the Court will presume that the instrument was stamped, unless there be evidence shewing that it was not stamped. *Hart v. Hart*, 1
2. To render secondary evidence admissible in proof of the contents of a lost document, it is sufficient to prove that every reasonable search for the document has been made, although every possible search may not appear to have been made. *Id.*
3. The parties agreed to admit in the cause, certain facts in the same manner as if they had been proved by proper and legal evidence; and among others, that a certain exhibit was the notice, and a certain

- other exhibit was a *true copy of the lease* referred to in the notice:—*Held*, that the notice was not evidence of the lease so as to relieve the defendant from the necessity of calling the attesting witness. *Mounsey v. Burnham* 15
4. That the admission as to the copy of the lease substituted the copy for the original, but did not place the copy in a better situation than the original, if it had been produced. *Ib.*
 5. The admission of a will, in the separate answer of a married woman, who is the heiress-at-law of the testator, is not sufficient evidence to enable the Court to declare the will established. *Brown v. Hayward*, 433
 6. Whether in the case of a claim made adversely to a class of persons, the mode of proving that all the members of the class are parties, is necessarily by inquiry before the Master—*quære*. *Hawkins v. Hawkins*, 543

EXCEPTIONS.

See INJUNCTION, 1, 2, 3.—OBJECTIONS TO DRAFT REPORT.

1. Where an answer is reported sufficient, and the bill is amended, the Plaintiff cannot again sustain exceptions on the old matters. If the further answer is referred on new exceptions relating to the old matters, the Defendant may object that the answer in such respects must be deemed sufficient; and it is not necessary that he should move to discharge the order of reference. *Duncombe v. Davis*, 184
2. There is no exception to the foregoing rule, where the amendments consist of particular charges and interrogatories, which were included in a general charge in the original bill, or of a prayer for specific relief included in the general prayer; but,
3. Whether there is an exception to the rule, where a new case is made by the amended bill—*quære* *Ib.*
4. The Court will, in a proper case, entertain a special application to refer an answer to the Master to con-

sider its sufficiency, without regard to the fact, that, by amending, the Plaintiff has, in form, admitted it to be sufficient. *Ib.*

5. In a case which is brought on in the form of exceptions, but in which the substantial order would be the same however the exceptions may be disposed of, the Court may dispose of the case, without making any order upon the exceptions. *Hall v. Laver*, 571
6. Where, on a reference as to title in a suit against a purchaser for specific performance, the Master reports in favour of the title, but the Court holds it to be so doubtful that the purchaser should not be compelled to take it, the bill may be dismissed without overruling the exceptions taken by the Defendant to the report. *Robinson v. Milner*, 578, n.
7. An order to set down for argument exceptions to the Master's report of insufficiency, obtained after service of an order for leave to amend, and for the Defendant to answer the amendments and exceptions together is irregular. *Earl of Glengal v. Bland*, 624

EXECUTOR AND ADMINISTRATOR.

See ADMINISTRATION.—DEBT.—PARTIES, 3, 4, 6.

EXHIBIT.

1. A deed proved by the attesting witness *viva voce* at the hearing, is well proved for all purposes in the cause, unless it is impeached. *Bowser v. Colby*, 109
2. The 43d order of August, 1841, allowing exhibits to be proved by affidavit, instead of *viva voce* at the hearing, does not dispense with the practice of obtaining the order of leave to prove the exhibit at the hearing, but that order may be obtained after the affidavit has been made. *Clare v. Wood*, 314

FAMILY. *See* DEVISE.

FELON.

See ASSIGNMENT, 1.—ATTORNEY-GENERAL.—STOCK.

FELONY.

Whether the party who has been injured by a felonious taking of his property, and is prosecuting the imputed felon, may not sustain a bill or proceeding in equity against the latter, to preserve in the meantime the property, the abstraction of which is the subject of the criminal charge—*quare*. In the matter of the Marquis of Hertford, 584

FORECLOSURE.

See COSTS, 5, 6.—SET-OFF.

1. Where, after the second report, and day of payment fixed, in a foreclosure suit, the mortgagor was prevented by the act of the mortgagee from receiving the rents of the property, the time of payment was ordered to be enlarged for three months, upon payment by the mortgagor within one month of the interest and costs found due by the last report; notwithstanding there was doubt whether the value of the security was ample. *Geldard v. Hornby* 251
2. The mortgagee of a real estate made a further advance, and took, as security for the same, a further charge upon the mortgaged premises; the covenant of the mortgagor for payment, and an assignment of a policy of assurance on the life of the mortgagor, upon trust to receive the monies to become payable on the policy, and thereout first to pay the expenses of the trust, then to apply the residue towards payment of the mortgage debts, or so much thereof as should remain due, and subject thereto upon trust for the mortgagor. Upon the bill of the mortgagee praying a sale of the policy, and payment by the mortgagor of so much of the debt as the proceeds of the sale should be insufficient to pay, or in default that the mortgagor might be foreclosed:—*Held*, that the mortgage was en-

titled only to the usual decree for payment or foreclosure of the real estate, and not to a decree for the sale of the policy; but that he was entitled to retain the policy upon the terms of the trust, notwithstanding the foreclosure of the real estate. *Dyson v. Morris* 314

3. A conveyance of an estate to A. in trust, that the same should stand chargeable with a sum of money and interest, and subject thereto in trust for B., with a power of sale by A., upon non-payment, after notice, is not a mortgage entitling A. to bring his bill for foreclosure. *Sampson v. Pattison*, 533

FORFEITURE.

See PAYMENT INTO COURT.—STATUTES, CONSTRUCTION OF, 1.

1. A court of equity will relieve a lessee from a forfeiture by non-payment of rent, where there is a proviso that in that case the lease shall be void, as well as where there is a mere power of re entry.
2. Equitable agreements, charging the property comprised in a lease, but not accompanied with a change of possession or other alteration of the property, do not work a forfeiture of the lease in equity, notwithstanding there is a clause in the lease against assignment—*semble*.
3. A court of equity, when asked by a lessee to grant him relief against forfeiture, will consider the conduct of the lessee in dealing with the property, whether that conduct does or not involve a breach of covenant. *Bowser v. Colby*, 109

FRAUD.

See MARITAL RIGHT.

1. To what extent the equity of the husband to set aside a settlement, as a fraud on his marital right, is taken away, by the absence of any other settlement in favour of the wife, or the poverty of the husband, or the reasonable nature or meritorious object of the impeached settlement, or

the ignorance of the husband of the existence of the settled property—*quere.*

2. It is not necessary, in order to establish his title to this equity, that the husband should prove actual fraud or deception, for deception will be inferred, if, after the commencement of the treaty of marriage, the wife should have attempted to dispose of her property, without the knowledge or concurrence of her intended husband.
Taylor v. Pugh, 608

FUTURE CARGO.

See ASSIGNMENT, 2.

GENERAL ORDERS.

XV. of 1828.

See REPLICATION, 1.

XVI. of 1831.

See REPLICATION, 2.

V. of 9th May, 1839.

See AFFIDAVIT, 5.

PRELIMINARY INQUIRIES.

I. et seq. of 10th May, 1839.

See DECREE, 1.

VIII. of August, 1841.

See APPEARANCE.

ATTACHMENT.

XI. *Id.*

See DECREE, 2.

XII. *Id.*

See DECREE, 2.

XVII. *Id.*

See INTERROGATORIES, 2, 3.

XVIII. *Id.*

See INTERROGATORIES, 2, 3.

XIX. *Id.*

See INTERROGATORIES, 2, 3.

XXI. *Id.*

See TRAVELLING NOTE.

XXIII. *Id.*

See BILL.—INFANT.—PLEADINGS, 2.

XXIV. *Id.*

See BILL.

INFANT.

INTERROGATORIES, 1.

XL. *Id.*

See PARTIES, 1, 2.

XLIII. *Id.*

See EXHIBIT, 2.

XLVIII. *Id.*

See MASTER'S REPORT.

GUARDIAN.

See RECEIVER, 5.

HEIR-AT-LAW.

See EVIDENCE, 5.

The heir-at-law of the vendor of real estate is a necessary party to a suit by the administrator of the vendor against the purchaser for specific performance of the contract. *Roberts v. Marchant* 547

HUSBAND AND WIFE.

See EVIDENCE, 5.—FRAUD.—MARITAL RIGHT.

IMPLICATION.

A devise and bequest of real and personal estate upon trust for the children of the testator, subject to the dower and thirds at common law of his wife, followed by a direction to apply the rents, issues, and profits, after deducting the dower and thirds of his wife, to the maintenance of the children, is not, by implication, a gift of any interest in the estate to the wife. *Adams v. Adams,* 537

INCUMBRANCER.

See NOTICE, 1, 4.—PRIORITY.

INFANT.

See MARRIAGE.

The motion for leave to enter a memorandum of service of a copy of the bill, under the 24th Order of August, 1841, needs not to be supported by

an affidavit, shewing that the Defendant is not an infant. *Welch v. Welch*, 593

INJUNCTION.

See DEMURRER.—INSOLVENT DEBTOR. JURISDICTION, 1.—STATUTES, CONSTRUCTION OF, 1, 4.—TRUST, 1.

1. It is not the practice of the Court to look into the answer to an injunction bill, for the purpose of determining whether the answer is sufficient, without exceptions having been previously taken thereto, notwithstanding the answer may be filed so near the day of trial, that it is probable the trial will be had before the proceedings can be stayed by the result of a reference in the usual course. If the answer were a mere pretence and evasive, it might be otherwise. *Scotson v. Gentry*, 99
2. If, in such a case, the answer is excepted to for insufficiency, the Court will look into the exceptions and the answer, instantler, without referring them. *Ib.*
3. Where the Master has certified the Defendant's answer to be insufficient, the Court, notwithstanding the Plaintiff has been dilatory in his application for the injunction, will, on the eve of the trial, look into the answer and the exceptions, instantler, to determine if the answer is evasive. *Ib.*
4. The goods of the Defendant, and the lease of certain premises belonging to him, were taken in execution under a fi. fa. and sold: the Plaintiff became the purchaser of the terms, and was put into possession of the premises by the sheriff, but no assignment of the term was otherwise made. The Defendant afterwards brought ejectment and recovered. The Plaintiff filed his bill to restrain proceedings in the ejectment, and moved for the injunction upon the answer, by which the Defendant, admitting the Plaintiff's case, insisted upon alleged irregularities in the execution of the fi. fa., which, it was argued, rendered the proceedings in that execution invalid at law. The Court granted the injunction, with

liberty to the Plaintiff to take such proceedings at law as he might be advised to perfect his title. *Jones v. Hughes*, 283

INQUIRY.

See PRIORITY.

Circumstances under which the Court will, before making any other decree in the cause, direct an inquiry with respect to a document which is insisted upon as affecting the interests of the parties in the matter in question, but is not produced. *Hart v. Hart*, 1

INSOLVENT DEBTOR.

The assignee of an insolvent debtor is a necessary party to a bill by the insolvent, praying that an instrument which belonged to him, prior to his insolvency, may be delivered up to him, and an injunction to restrain proceedings upon it. *Balls v. Strutt*, 146

INTERROGATORIES.

See DEBT.

PARTIES, 7.

1. The affidavit of service of the copy of the bill, under the 23rd Order of August, 1841, on the motion for leave to enter the memorandum of service under the 24th Order, must show that in the copy served the interrogating part was omitted. *Gibson v. Haines*, 317
2. A sole Defendant, who is specially interrogated to the matter of the bill, and who has taken an office copy of the bill containing the interrogatories, is not exempted from answering the same, on the ground that the interrogatories are not numbered or specified in a note at the foot of the bill. *Lynch v. Leceane*, 626
3. *Semble*, the 17th, 18th, and 19th Orders of August, 1841, do not apply to a suit, where there is an only Defendant, *Ib.*

INTERPLEADER.

See COSSA, 8.

1. Circumstances under which no costs will be ordered to be paid, as between Co-Defendants, in an interpleading suit. *Meux v. Bell*, 73
2. A supplemental bill of interpleader held to be regular, although filed in respect of a sum amounting to less than £10. *Crawford v. Fisher*, 436
3. Observations on the circumstances which render cases properly, or not properly, the subjects of interpleader. *Ib.*
4. *Semble*, a suit of interpleader ought to be so constituted at the hearing, that the decree may embrace the whole property, which is the subject, of the claims of the Defendant at whereupon the Court is required to adjudicate. *Ib.*

IRREGULARITY

See DE BENE ESSE, 2.—EXCEPTIONS, 7.
OFFICE.—PLEADINGS.—TAKING.

ISSUE.

See SPECIFIC PERFORMANCE, 7.

JUDGMENT CREDITOR.

A ship being on her voyage at the time of the assignment of the ship and cargo by way of mortgage, the parties sent notice of the assignment to the master of the ship, and the master delivered up possession of the ship and cargo to the mortgagees, immediately after her return from the voyage:—*Held*, that the equitable title of the mortgagees to the cargo was perfected, and could not be defeated by a judgment creditor of the assignor, who afterwards sued out a writ of fi. fa., and proceeded to take the ship and cargo in execution. *Langton v. Horton*, 549

JURISDICTION.

See PARTIES, 7.—TAXATION.

1. Plaintiffs in equity claiming to be admitted as creditors under a fiat in bankruptcy, in respect of a breach of trust by the bankrupts, which was the subject of the suit in equity, applied, on a dividend of the bankrupt's estate being about to be declared, to be allowed to enter a

claim upon the proceedings, and to have a fund reserved: the application being refused by the commissioners, was renewed by petition to the Court of Review, and also refused by that Court. A supplemental bill was then filed, praying an injunction to restrain the assignees from paying any dividend which might be declared, until the cause in equity was heard, or without reserving a sufficient fund to answer the Plaintiffs' demand.

Held,—That if the Court of Chancery had jurisdiction to interfere in the distribution of the estate of a bankrupt, the Court ought, upon general principles, after an adjudication in bankruptcy on the subject of the distribution, to refrain from exercising such jurisdiction. *Thompson v. Derham and Thompson v. Goodman*, 358

2. *Semble*,—The Court has no jurisdiction to interfere in the mere distribution of the estate of a bankrupt, either on the ground of trust or otherwise. *Ib.*
3. The Vice-Chancellor cannot, without special authority, hear a motion to discharge an order of the Lord Chancellor, though made upon petition as of course. *Earl of Glen-gall v. Bland*, 624

LEASE.

See FORFEITURE.

A lease provided, that, in case of any breach of covenant, it should be lawful for the lessor to re-enter and expel the lessee, and the lease should, in that case, be forfeited, and be utterly null and void. The lessee committed a breach by non-payment of rent:—*Semble*, such a lease is voidable and not void. *Bowser v. Colby*, 109

LEGACY.

See WILL, 1.—MARRIAGE.

A legacy to be paid to the legatee "when or if" he attained 21, held to be vested at the death of the testator, and not to be contingent upon the legatee attaining 21. *Lester v. Bradley*, 10

MAINTENANCE.

See WILL, 2.

The testator directed that all and every part of his property should be at the disposal of his wife for herself and her children. The widow took out administration to the testator's estate and executed a voluntary deed whereby she settled the greater part of the fund of which the estate consisted, upon trust for herself for life, with remainder to her children :—*Held*, that, under the will the childrer took an interest in possession of the property of the testator at his decease, and that the settlement was not binding upon them, and consequently was not binding upon the widow. And the mother maintaining and educating the children in a proper manner, the whole of the income of the residuary estate was ordered to be paid to her during the infancy of the children, or until further order, with liberty to her and her children to apply. *Crockett v. Crockett*, 451

MARITAL RIGHT.

See FRAUD.

The equity of the husband to set aside a settlement of the property of his wife, executed by her during the treaty of marriage, without his knowledge, is precluded by his conduct towards her, whereby she is deprived of the power of retiring from the marriage, or, therefore, of stipulating for a settlement. *Taylor v. Pugh*, 608

MARRIAGE.

See CONSENT.

MOTION.

MASTER'S REPORT.

See OBJECTIONS TO REPORT.

Construction of the 48th Order of the 26th of August, 1841, on the framing of the Master's reports. *Meux v. Bell*, 73

MINES.

In a contract for sale of the mineral under a given quantity of surface, at a certain price, payable by instal-

ments, the times of payment to be accelerated if more than a certain quantity of minerals should be gotten from time to time, the vendor impliedly reserves the power of entering and inspecting the mines, to ascertain the quantity of minerals from time to time gotten therefrom; and the vendor is entitled to specific performance of the contract, with a covenant reserving such power in the conveyance. *Blakesley v. Whieldon*, 176

MORTGAGE.

See ADMINISTRATION.—COSTS, 5, 6.—FORECLOSURE.—RECEIVER.

1. Assignment of a policy of insurance upon trust, as a collateral security accompanying a mortgage of real estate :—*Held*, under the circumstances, not to entitle the mortgagee to a decree for the sale of the policy. *Dyson v. Morris*, 413
2. Conveyance of real estate upon trust to secure the payment of advances made upon the security thereof, with a power of sale, held not to entitle the mortgagee to a decree for foreclosure. *Sampson v. Pattison*, 533

MORTMAIN.

See DEVISE.

MOTION.

See DECREE, 2.—TRUST, 1.

1. A motion to make an award an order of Court is not a motion of course, but is a special motion to be made upon notice. *Wilkinson v. Page*, 280
- 2 Order made upon motion, fixing a time for the performance of an act, which a decree made upon a bill taken pro confesso had ordered to be done. *Needham v. Needham*, 633

NEGLIGENCE.

See NOTICE, 2.

NEXT OF KIN.

See PARTIES, 3.

NOTICE.

See AGREEMENT, 1.—ASSIGNMENT, 3. PRIORITY.—SOLICITOR, 1.

1. A party, before advancing money on a mortgage, inquired of the mortgagor and his wife, whether any settlement had been made upon their marriage, and was informed that a settlement had been made of the wife's fortune only, and that it did not include the husband's estate which was proposed as the security, and he afterwards advanced the mortgage-money without having seen the settlement or known its contents:—*Held* that the mortgage was not, under the circumstances, affected with constructive notice of the contents of the settlement or the fact that the settlement comprised the husband's estate. *Jones v. Smith* 34
2. Negligence may be evidence of, but it is not in law the same thing as, mala fides. *Ib.*
3. The doctrine of constructive notice applies in two cases; first, where the party charged has notice that the property in dispute is incumbered, or in some way affected, in which case he is deemed to have notice of the facts and instruments, to a knowledge whereof he would have been led by due inquiry after the fact which he actually knew, and secondly, where the conduct of the party charged evinces that he had a suspicion of the truth, and wilfully or fraudulently determined to avoid receiving actual notice of it. *Ib.*
4. It is not necessary to give notice of an equitable incumbrance to more than one of several trustees of the property, so long as the circumstances of the case remain unaltered, by the death of that trustee, or his ceasing to continue such trustee, or otherwise. *Meux v. Bell*, 73
5. On the question of notice, where there is actual knowledge, the Court will not distinguish between knowledge acquired in one character, and that obtained in another. *Ib.*
6. Notice of an equitable assignment, to the trustee or one of several trustees of the property, is necessary in order to perfect the assignment, and to acquire and maintain priority. *Ib.*

OBJECTIONS TO REPORT.

Where a report of the Master requires

confirmation and further directions by the Court to give it effect, a petition in the nature of exceptions to the report cannot be heard, unless objections have been taken before the Master to the draft of the report. *Ottey v. Pensam*, 323

OFFICIAL ASSIGNEE.

See COSTS, 6.

ORDERS.

See GENERAL ORDERS.

PARTIES.

See BANK OF ENGLAND.—HEIR AT LAW.—INSOLVENT DEBTOR.

1. To a suit for the execution of a trust, created for the benefit of the Plaintiffs and other specified creditors, against the trustees, (the fund having been brought into Court), the person who created the trust, or his personal representative, is a necessary party; and it is not a case in which the Court will, under the 40th Order of August 1841, make a decree saving the rights of such party when absent, although the Defendants say that the trust fund is insufficient for the purposes for which it was created, and that there is, therefore, no surplus to be paid to the absent party. *Kimber v. Ensworth*, 293
2. *Semble*—The 40th Order of August 1841, enabling the Court to make a decree saving the rights of absent parties, does not apply to cases where the security of an absent party might be prejudiced by the decree, or where the effect of the decree might be to transfer the legal interest in property in which the absent party is equitably interested. *Ib.*
3. In a suit to administer an estate where inquiries are necessary to ascertain a class of persons beneficially interested, the regular course is, to direct the inquiry as to such persons in the first instance, and not (until that inquiry is answered) to order the Master to proceed to take the accounts. It is only where the circumstances of the case are such as to satisfy the Court that the persons interested are parties to the suit, that the Court will, at the hearing, direct

- the Master to proceed to take the accounts, if he should find the persons interested are parties. *Baker v. Harwood and Fenwick v. Baker*, 327
4. An allegation that A., B., and C., were named executors, and that A. and B. proved the will, and are the personal representatives of the testator, may be proved by the production of the probate: and in the absence of any denial of that fact by the answers, or any averment that C. also proved, C. is not a necessary party to the suit. *Dyson v. Morris*, 413
5. A party named as Defendant to the bill may, with the consent of the Plaintiff only, appear at the hearing of the cause, and be bound by the decree, although such party has not been served with the subpoena to appear, or has not appeared in the suit; but a person who has not been named as a Defendant to the bill, cannot appear at the hearing without the consent of all parties to the cause. *Ib.*
6. To a suit in respect of an unadministered part of a testator's estate, which has been remitted from India and remains in the hands of an executor residing in England, but who was only constituted executor of the testator in India,—against such executor, a personal representative constituted in England is a necessary party. *Bond v. Graham*, 482
7. Two of the Defendants were alleged, and in like manner admitted, to be out of the jurisdiction; but the fact was not proved: liberty was given, under the decree, to exhibit interrogatories for that purpose. *Hughes v. Eades*, 486
8. Under the circumstances, a party named as a trustee in articles for a settlement, but who had not acted or executed any deed of trust, was allowed to sustain a suit to carry the articles into effect. *Cook v. Fryer*, 498
9. The court will neither decide a question between a class of persons and a party claiming adversely to that class, nor decree the distribution of a fund amongst a class of persons,—without evidence that all the members

of such class are parties to the proceeding. *Hawkins v. Hawkins*, 543

10. Whether, in the case of a claim made adversely to a class of persons, the mode of proving that all the members of the class are parties, is necessarily by inquiry before the Master—*quare*. *Ib.*

PARTNER.

See PLEA.

Where a surviving partner has carried on the partnership business without withdrawing from the concern the capital or share of a deceased partner, there is no absolute rule that, in taking the subsequent accounts of the partnership dealings, as between the surviving and the estate of the deceased partner, the division of the profits shall be determined by the aliquot shares of the several partners in the business, in their joint lifetime,—or by the amount of the agreed capital which they were respectively to supply,—or by the actual amount of the capital belonging to the surviving and the estate of the deceased partner respectively; but the principle of division may be affected by considerations of the source of the profit, the nature of the business, and the other circumstances of the case. *Willett v. Blanford*, 253

PAYMENT INTO COURT.

See STATUTES CONSTRUCTION OF, 1.

Where the suit to redeem the lease was brought by the personal representatives of the lessee, evidence having been given, tending to shew, that the lessee in his lifetime was insolvent, and had committed breaches of covenant, and that his estate was also insolvent, the Court directed an issue to try whether other breaches of covenant had been committed or waived, but imposed it as a term upon the Plaintiff that he should previously pay into Court the costs at law and the arrears of rent due at the time the lessor sued out his writ of possession. *Bowser v. Colby*, 109

PAYMENT OUT OF COURT.

See DISMISSAL, 1.

Where the sum to be paid out of Court amounts to 1*l.*, it will not be ordered to be paid to the solicitor. *Hawkins v. Dodd*, 146

PERPETUITY.

See DEVISE.

PETITION.

See OBJECTIONS TO REPORT.

PLAINTIFF.

See PARTIES, 8.

PLEA.

1. To a bill for an account of the dealings and transactions of a partnership, by the executors of a deceased partner, the Defendant pleaded that, for a certain consideration, an agreement (not in writing) was entered into between the testator and himself, that all accounts between them and all claims of the testator in respect of the estate, monies, and effects of the partnership, and the debts due to and from the same should be waived:—*Held*, that the agreement should be construed to import that the Defendant thereby took upon himself the discharge of the partnership liabilities, but that the plea was bad, inasmuch as it did not aver, that no such liabilities still remained to be discharged. *Brown v. Perkins*, 564
2. *Seemle*, there is no rule that a release or a stated account are the only defences which can be set up by way of plea to a bill for an account. *Ib.*

PLEADING.

See ANSWER.—BILL.—DEMURRER.—INTERPLEADER, 2, 3, 4.—PLEA.

1. Each of two original suits to recover the same sum of money became defective by the insolvency of a party who was Plaintiff in the first of the causes and a Defendant in the second; the Plaintiff in the second suit not being a party to the first suit:—

Held, that the defect in the first suit was not remedied by a supplemental bill in the second suit, before a decree was obtained in that suit. *Catell v. Corral*, 216

2. The prayer, under the 23rd Order of August, 1841, "that the Defendant, upon being served with a copy of the bill, may be bound" &c., will be required to be inserted in the prayer of process. *Gibson v. Haines*, 317
3. Observations on the cases in which Defendants to an original bill should be made Defendants to a supplemental bill. *Dyson v. Morris*, 413

POLICY OF INSURANCE.

See AGREEMENT.—FORECLOSURE, 2.—MORTGAGE, 1.

PRACTICE.

See ABATEMENT.—AFFIDAVIT.—ANSWER.—APPEARANCE.—ATTACHMENT. BILL.—DE BENNE ESSE.—DISMISSAL. DISTRINGAS.—EVIDENCE, 5, 6.—EXCEPTIONS.—EXHIBIT.—GENERAL ORDERS.—INJUNCTION, 1, 2, 3.—INTERROGATORIES.—JURISDICTION, 3. MASTER'S REPORT.—MOTION.—OBJECTIONS TO DRAFT REPORT.—PARTIES, 3, 5, 6, 9, 10.—PRELIMINARY INQUIRIES.—PRISONER.—PRO CONFESSO.—REPLICATION.—SERVICE. SUNDAY.—TAKING PLEADINGS OFF THE FILE.—TRAVERSING NOTE.—UNDERTAKING TO SPEED.

PRELIMINARY INQUIRIES.

1. The Plaintiffs, claiming to be next of kin of the testatrix, filed their bill against the executors in respect of legacies which had failed: the executors answered, but did not admit that the Plaintiffs were such next of kin: the Plaintiffs moved, under the 5th Order of the 9th of May, 1839, for a reference to inquire who were the next of kin of the testatrix: motion refused. *Topham v. Lightbody*, 289
2. A preliminary inquiry may be directed, under the 5th Order of the 9th of May, 1839, where the evidence upon the answer is a sufficient foundation for the order, but not where, if the cause were heard upon that

evidence, the bill would be dismissed
Ib.

PRIORITY.

See NOTICE, 1, 4, 5, 6.

Inquiry by a puisne incumbrancer on an equitable interest is immaterial, where none of the trustees of the property, at the time, knew of the prior incumbrance, and where the result of the inquiry would not, therefore, have affected the conduct of the puisne incumbrancer. *Meux v. Bell*, 73

PRISONER.

See STATUTES, CONSTRUCTION OF, 2.

A prisoner, who, having been placed in custody by a lawful attachment, has remained in prison voluntarily without claiming his discharge after he was entitled to be discharged, may be regularly detained under another attachment lawfully issuing against him. *Woodward v. Conebeer*, 297

PRO CONFESSO.

See MOTION, 2.

PRODUCTION OF DOCUMENTS.

See AFFIDAVIT, 3, 4.

1. An admission in the answer to a bill of discovery, that the Defendant possessed documents specified in a schedule wholly or in part relating to the matters mentioned in the bill, not accompanied by a precise denial of a precise case which the bill specifically charged, or by a denial that the documents related to that case, *held* to entitle the Plaintiff to the inspection of all the documents in the schedule which might be evidence on the case so specifically charged, although the Defendant said they were the evidences of his own title. *Smith v. Duke of Beaufort*, 507
2. On a motion for the production of documents, a survey or valuation of the property to which the question in the cause related, described by the Defendant as consisting of his evidence, and supporting his case, and not that of the Plaintiff, and made with a view to the defence in the suit —was considered as a minute fur-

nished by a witness of the evidence he would give, and, as such, it was held, that the plaintiff was not entitled to the production of it. *Lel-wellyn v. Badeley*. 527

PROFITS.

See PARTNER.—TRUST, 4.

PROVISIONAL ASSIGNEE.

See COSTS, 5.

RECEIVER.

1. A mortgagor having only a life-interest in the mortgaged premises, and a mortgagee having a charge both on the life-interest and on the interest in remainder, by a joint deed appoint a receiver, who is directed to pay certain debts, expenses, and the charge on the life-interest, and to keep down the interest on the residue. The mortgagee dies, and afterwards the mortgagor. The receiver continues in receipt of the rents and profits after the death of the mortgagor, and pays some part of the rents to the representatives of the mortgagee: —*Held*, that, upon the construction of the deed, the possession of the receiver was not the possession of the mortgagee; but there was ground for an inquiry whether the representative of the mortgagee had by any acts constituted the receiver her agent exclusively. *Jones v. Smith*, 43
2. Where probate or administration has been granted by the Ecclesiastical Court, a receiver will not be appointed pending litigation to recall probate or grant of administration, unless a special case be made out for such appointment. *Rendall v. Rendall*, 152
3. Where no probate or administration has been granted, it is of course to appoint a receiver, pending a bona fide litigation in the Ecclesiastical Court, to determine the right to probate or administration, unless a special case can be made for refusing such appointment. *Ib.*
4. The fact that the litigation in the Ecclesiastical Court is on the question of which of two alleged wills shall be admitted to probate, and

that the Defendant in the suit in equity 'is named executor in both wills, is not a ground for refusing to appoint a receiver. *Ib.*

5. The appointment of a testamentary guardian of an infant by his father does not, under the statute 12 Car. 2, c. 24, constitute any objection to the appointment of a receiver of the estate of the infant. *Gardner v. Blane*, 381
6. Where there are several trustees, the disclaimer of some of them is not alone a sufficient ground for the appointment of a receiver, without the consent of those who remain. *Browell v. Reed*, 434

REPLICATION.

1. The application, under the 15th Order of 1828, for leave to withdraw replication and amend the bill, is not sufficiently supported by an affidavit of the *solicitor* of the Plaintiff, that the proposed amendment is material. *Phillips v. Goding*, 40
2. A Plaintiff, who upon a motion to dismiss his bill for want of prosecution, has undertaken to speed the cause, according to the terms of the 16th Order of 1831, is not bound to file a replication within three weeks from the date of his undertaking, if he does not require a commission to examine witnesses. *Darby v. Smale*, 490

RETAINER.

See ADMINISTRATION.

SALE.

See CHARITY.—FORECLOSURE, 2, 3.

A conveyance of an estate to A., in trust that the same should stand chargeable with a sum of money and interest, and subject thereto in trust for B., with a power of sale by A., upon non-payment after notice, entitles him to the aid of the Court in effecting a sale. *Sampson v. Patison*, 533

SERVICE.

See BILL.—INFANT.

SET-OFF.

A trustee of real estate became mortgagee of the trust estate, partly by taking an assignment of a prior mortgage, partly by taking an assignment of a mortgage created by his co-trustee and himself under their power for the purposes of the trust, and partly for money which he lent to the cestui que trust of the equity of redemption, subject to charges created by the will. The mortgagee and trustee filed his bill for foreclosure simply. The cestui que trust of the equity of redemption filed his bill for an account of the trust of the mortgages, and that the mortgages might be ordered to stand as securities only for the balance due to the mortgagee and trustee upon the mortgage and trust accounts:—*Held*, that the Court might make one decree in both causes, so as to give the mortgagor any set-off he might be entitled to,—or make a decree of foreclosure in the former suit, and a separate decree for an account against the trustee personally in the latter, according to the circumstances and justice of the case. *Dodd v. Lydall*, 333

SETTLEMENT.

See FRAUD.—MARITAL RIGHT.

SHIP.

See FUTURE CARGO.

SOLICITOR.

See COSTS, 10, 11, 12.—PAYMENT.—OF MONEY OUT OF COURT.—TAXATION.

1. A solicitor, who prepared a deed of charge on behalf of the mortgagor and mortgagee, held to have notice of that incumbrance on the occasion of taking a subsequent mortgage of the same property to himself. *Perkins v. Bradley*, 219
2. The fact that a party,—knowing that his name has, without authority, been introduced as Plaintiff by the solicitor of some of the other Plaintiffs in a suit,—does not take any active steps to have his name expunged as Plaintiff from the record,

is not, as between that party and the solicitor, equivalent to a retainer or an adoption of the latter as his solicitor.
Hall v. Laver, 571

SPECIFIC PERFORMANCE.

See EXCEPTIONS, 6.—MINES.

1. The Plaintiff was the lessee of a house and other premises for a term of thirty-one years, at a rent of 60*l.*, and was under a covenant to make certain improvements on the property. He was also tenant from year to year of an adjoining meadow belonging to a different proprietor, at a rent of 9*l.* The lessor of the house became the purchaser of the meadow, and by arrangement between him and the Plaintiff, the improvements were extended, and part of the house was made to project over the field, and part of the field was attached to the demised premises, the Plaintiff paying about half the expense of the alterations, which far exceeded the sum he had originally covenanted to lay out, and also signing a memorandum, which the lessor drew up, whereby he agreed to pay an entire rent of 80*l.* a-year for the consolidated property:—*Held*, that the extension of the house into the meadow by the Plaintiff, with the concurrence of his landlord, was evidence of, and was sufficient consideration for, a contract to demise the meadow.
Sutherland v. Briggs, 26
2. That the act of building part of the house upon the meadow, if it was evidence of any right, was evidence of a right which affected the entire tenement, and that it could not be restricted so as to affect only the part of the meadow actually built upon.
Ib.
3. That the extension of the house, part of the demised premises, into the meadow, and the increase and consolidation of the rents, was evidence that the meadow was to be held for the same term as the demised premises.
Ib.
4. That the doctrine with regard to the mutuality of contracts, had no application to such a case.
Ib.
5. Lands were conveyed to a trustee,

in trust to grant a lease of the mines under the same to certain persons for forty-two years, and at the request of the lessees, made at any time thereafter, to grant a further lease of the same mines for twenty-one years, to commence at the expiration of the first term; the first lease to contain a covenant for renewal for the second term. The lease of forty-two years was made accordingly. Shortly before the expiration of the first term, the lessees applied for the renewal, which was refused. No proceedings were taken to enforce the performance of the covenant or trust for upwards of two years after the refusal:—*Held*, that so far as the title to renewal depended on the covenant, the delay or acquiescence would be a defence in equity. *Walker v. Jeffreys* 341

6. *Semble*—That the lessees had an equitable interest in the trust, which would not be divested by the delay alone,—but that the lessees, in support of their title to a decree for performance of the trust, must shew that they had, by performing the covenants on their part, paid the price for which, on the instruments, the lessors had stipulated. *Ib.*
7. The performance of the covenants by the lessees being doubtful, and the lessees declining to try issues as to that fact, the bill was dismissed with costs. *Ib.*

STATUTES. CONSTRUCTION OF.

4. *Geo. 2, c. 28.*

1. A lessee applying to redeem a lease, which has become forfeited at law by non-payment of rent, is not required by the statute 4 *Geo. 2, c. 28, s. 3*, before the hearing, to pay into Court the arrears of rent or the costs at law, if no injunction is granted until the hearing, and the lessor is in possession. *Bowser v. Colby* 109
- 1 *Will. 4, c. 36, s. 15, rule 5.*
2. The stat. 1 *Will. 4, c. 36, s. 15, rule 5*, does not make it imperative

upon the Plaintiff to bring a Defendant, who is in custody, up to the bar of the Court within thirty days, but only deprives the Plaintiff of the benefit of his process, and entitles the Defendant to his discharge, if the Plaintiff does not bring him up. *Woodwards v. Conebeer*, 297

2 & 3 Will. 4, c. 100.

3. The statute 2 & 3 Will. 4, c. 100, brings down the period of legal memory from the time of 1 Ric. 1 to the time of the commencement of two incumbencies, (not being together less than sixty years), and three years of a third incumbency; but does not create a new ground of exemption, or destroy the right to tithes upon mere proof of non-payment or non-render during two such incumbencies, and three years of a third, in cases where proof of non-payment or non-render from the time of 1 Ric. 1 would, before the statute 2 & 3 Will. 4, c. 100, have established no exemption. *Salkeld v. Johnson*, 196

5. *Vict. c. 5, s. 4.*

4. The order,—which under the act 5 *Vict. c. 5, s. 4*, may be issued upon motion or petition without bill filed, to restrain the Bank or any public company from permitting the transfer of stock or shares, or the payment of dividends,—cannot be continued after time has been afforded for filing a bill, and no bill has been filed. *In the matter of the Marquis of Hertford*, 584

5. *Vict. c. 5, s. 5.*

5. A party who has obtained a distringas, under s. 5 of the act 5 *Vict. c. 5*, may notwithstanding, in a proper case of merits and urgency, obtain a restraining order under s. 4. *Ib.*

STOCK.

See BANK OF ENGLAND.

SUBPCENA.

See APPEARANCE.

SUNDAY.

In the number of days for notice of the time and place of examining a witness, an intermediate Sunday is to be reckoned. *M'Intosh v. Great Western Railway Company*, 328

TAKING PLEADINGS OFF FILE.

The answer of a Defendant not answering any interrogatories of the bill, and which was put in after the time for answering had expired and an order for further time had been obtained, ordered to be taken off the file. *Lynch v. Lecesne*, 626

TAXATION.

In a suit against a solicitor for an account, in taking of which the bills of costs are taxed, and reduced more than one-sixth in amount, the Court has jurisdiction to give or withhold the costs of taxation, according to the circumstances and justice of the case. *Barton v. Pyne*, 493

TENANT FOR LIFE.

1. The testator directed his real and personal estate to be converted, got in, and invested in government or real securities, and the interest, dividends, and annual produce to be paid, to his wife for her life. The greater part of the testator's property at his death consisted of capital in a partnership business abroad, to be withdrawn, by instalments, in the course of three or five years, at the discretion of his executors, and bearing interest at five per cent. in the meantime.

Held, that the tenant for life would be entitled to the income actually produced by such of the property of the testator as was invested according to his will, from the time of such investment; but that she was not entitled during the first year after the testator's death to a larger income, in respect of such part of the testator's property as was not so invested, than the property would have produced, if invested according to the will. *Taylor v. Clark*, 161

2. Form of the reference to inquire whether it is proper to cut timber, during the continuance of the estate of a tenant for life of the lands, impeachable of waste. *Tollemache v. Tollemache*, 458

TITHES.

See **DISCLAIMER.—STATUTES, CONSTRUCTION OF**, 3.

The proof of the title of the vicar to some small tithes, and that the other small tithes had never been paid to the rector, is not necessarily sufficient to establish the right of the vicar to such other small tithes, especially where some of the evidence is opposed to the vicar's claim. *Saltsd v. Johnston*, 198

TITLE.

See **EXCEPTIONS**, 6.

TIMBER.

See **TENANT FOR LIFE**, 2.

TRAVERSING NOTE.

Leave to file a note under the 21st Order of August, 1841, will not be given where the subpoena to appear and answer was not served under the 14th Order. *Snell v. Crocker*, 108

TRUST.

See **FORECLOSURE**, 2, 3. — **PARTNER.—VOLUNTARY ASSIGNMENT.—WILL**, 2.

1. Injunction granted upon motion to restrain, until the hearing of the cause, an action by an administrator to recover a debt which was formerly due to his intestate,—upon affidavit that the intestate had requested the debtor to hold the sum due in trust for the Plaintiff, and that the debtor had accepted the trust, and paid over a part of the fund to the Plaintiff. *M'Fadden v. Jenkins*, 458
2. Whether the facts stated by the affidavit (plea 1), if proved, would

be sufficient to create a trust in favour of the Plaintiff—*quere.* *Ib.*

3. The testatrix drew a cheque on her bankers for 150*l.* in favour of A., and she verbally directed A. to apply that sum, or so much of it as might be necessary to make up to a legatee the difference in value between a legacy of 100*l.*, which the testatrix, by her will, had given to the legatee, and the price of a 100*l.* share in a certain railway; the testatrix informing A. that she intended to give the share instead of the legacy, but she did not think it necessary to alter her will. The bankers gave credit to A. for the 150*l.* The testatrix afterwards died. In a suit for the administration of her estate: *Held*, that no trust, in respect of the 50*l.*, was created for the benefit of the legatee. *Hughes v. Stubbs*, 478
- The transfer by an executor of the trade of his testator, and of the premises in which it was carried on, which were of small value to a third party, who afterwards continued the trade for his own benefit:—*Held*, under the circumstances, not to be necessarily a breach of trust. *Portlock v. Gardner*, 594
5. Where upwards of twenty years had elapsed after an executor had settled the accounts of his testator's estate with the residuary legatee, and had given up all interference in the trust, it was held, that the onus was on the residuary legatee to prove that the conduct of the executor, which might have been a breach of trust, was so in fact; and that the onus was not shifted by an admission that the account was settled on a misunderstanding of the rights of the parties, by which the residuary legatee was prejudiced. *Ib.*
6. A court of equity will not after a great lapse of time (as of more than twenty years), and where no actual fraud is proved, enter into inquiries for the purpose of raising an implied trust against the Defendant, although the same lapse of time would be no bar to a claim founded upon an express trust. *Ib.*

TRUSTEE AND CESTUI QUE TRUST.

See COSTS, 11.

DEMURRER.—NOTICE, 4, 5, 6.—
PARTIES, 1, 8.—RECEIVER, 6.

UNCERTAINTY.

See DEVISE.

UNDERTAKING TO SPEED.

See REPLICATION, 2.

VENDOR AND PURCHASER.

See SPECIFIC PERFORMANCE.

VESTED LEGACY.

See LEGACY.

VICE-CHANCELLOR

See JURISDICTION, 3.

WILL.

VOLUNTARY ASSIGNMENT.

See TRUST, 1, 2, 3.

M., who in the event of surviving her daughter, and of the death of her daughter without issue, would, as next of kin, be entitled to a fund, which was vested in trustees, executed a voluntary assignment of her interest in the fund to the husband of the daughter, and declared the trusts of the assignment, as to part for the benefit of *M.* herself, and as to another part for the daughter's husband absolutely. No notice of the assignment was given to the trustees. The daughter afterwards died without issue; and the husband filed his bill against the trustees and *M.* to

compel the performance of the trust: *Held*, that the voluntary assignment did not create a trust which a court of equity would enforce; and the bill was dismissed. *Meek v. Kettlewell*, 467

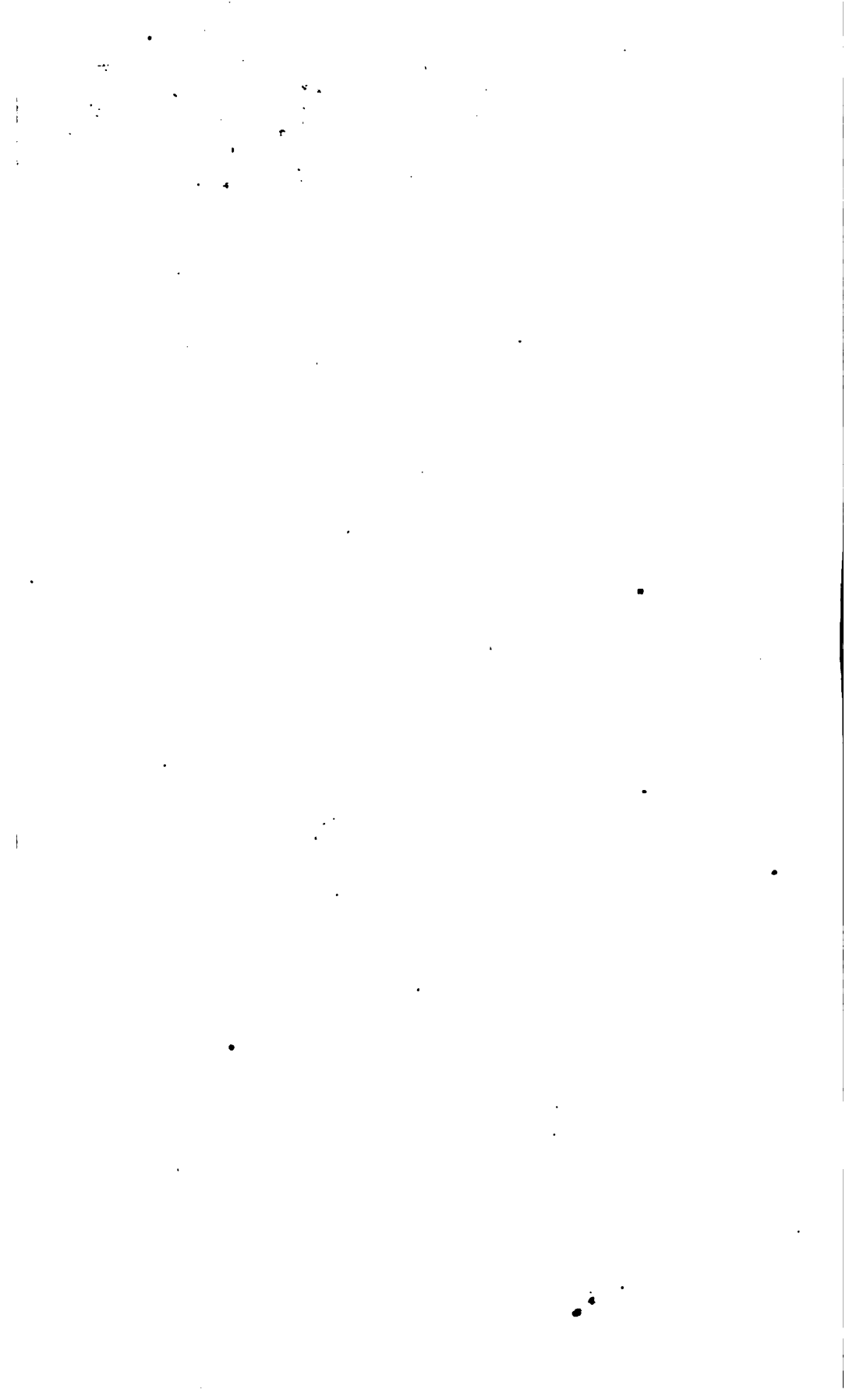
WILL.

See DEVISE.—EVIDENCE, 5.—LEGACY.
MAINTENANCE.

1. The testator bequeathed a leasehold house and premises, with the furniture and plate, to his son, and added, "and should he die without heir or will, the profits of the said house to be equally divided between all my grand-children, by the consent of his mother;" held that the son took an absolute interest in the house. *Green v. Harvey*, 498
2. Under a gift by a testator to his wife of his residuary personal estate, to the intent that she might dispose of the same for the benefit of herself and their children in such manner as she might deem most advantageous, the wife does not take an absolute interest. *Raikes v. Ward*, 445
3. A devise and bequest of real and personal estate upon trust for the children of the testator, subject to the dower and thirds at common law of his wife, followed by a direction to apply the rents, issues, and profits, after deducting the dower and thirds of his wife, to the maintenance of the children, is not, by implication, a gift of any interest in the estate to the wife. *Adams v. Adams*, 537

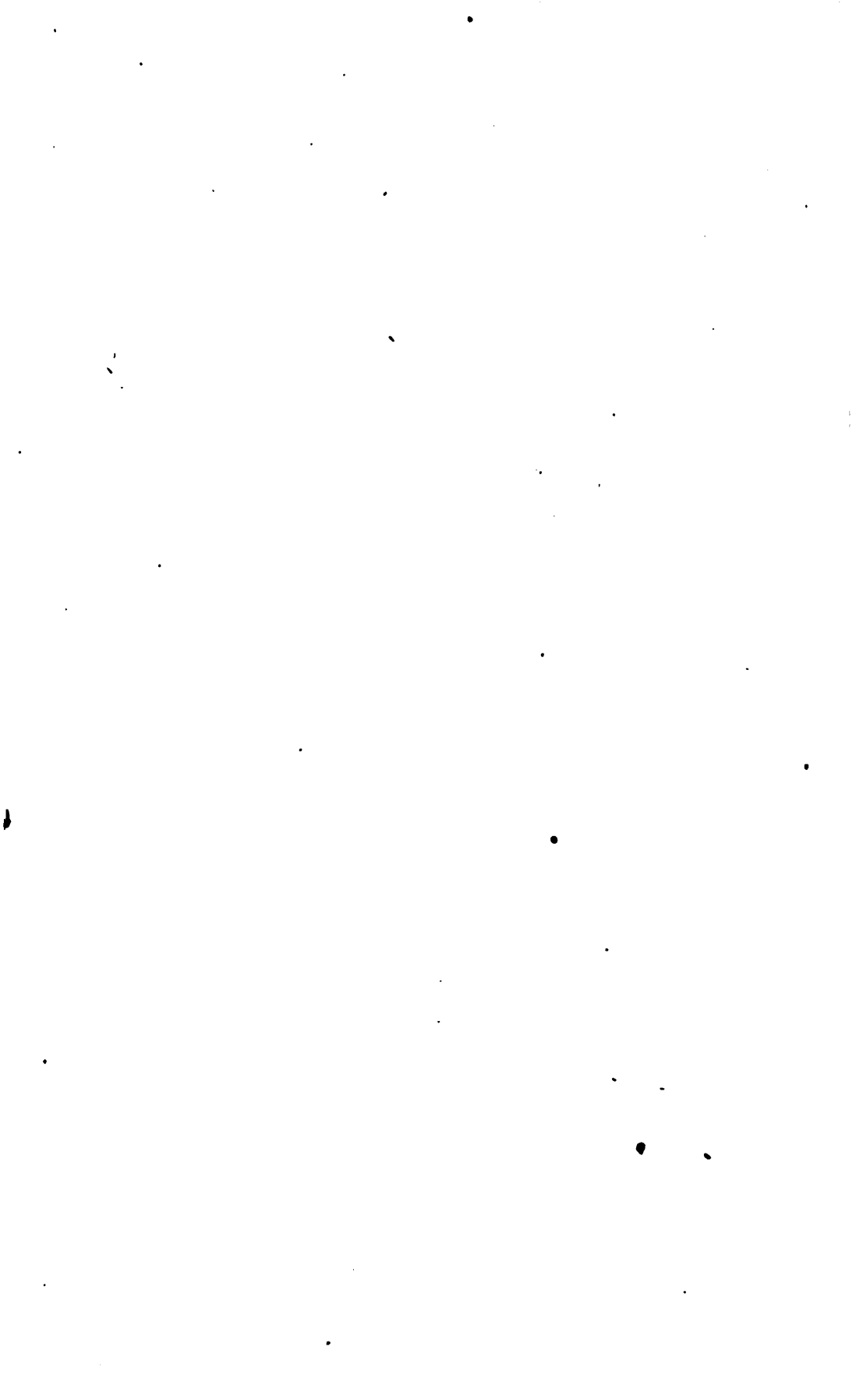
WITNESS.

See DE BENE ESSE.
VOLUNTARY ASSIGNMENT.









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